LEADING CASES IN CANADIAN CONSTITUTIONAL LAW

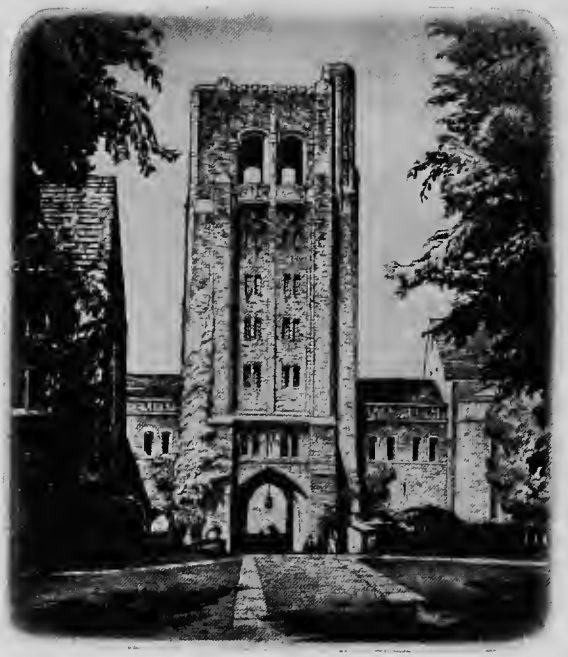
A. H. F. LEFROY, K.C.

SECOND EDITION

BY

R. F. M. WILLIAMS, Esq., B.A., LL.B.

1920



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A. H. F. LEFROY, K.C.

(Deceased)

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With Additional Cases

BY

R. F. McWILLIAMS, ESQ., B.A., LL.B.,

OF THE

Bars of Ontario and Manitoba

TORONTO:

THE CARSWELL COMPANY, LIMITED

1920

LONDON:

SWEET & MAXWELL, LIMITED

1920

DEDICATED

TO

THE STUDENTS OF THE UNIVERSITY OF TORONTO

AND OF

OSGOODE HALL,

PREFACE

In this little book I have endeavoured to make a complete collection of leading decisions under that part of the Constitution of the Dominion of Canada which is comprised in the British North America Act 1867, understanding by 'a leading case,' one that settles the law upon some important point. I would have it regarded as a supplement to Mr. Ernest C. Thomas' well-known and excellent collection of leading English constitutional cases. For the leading cases in English constitutional law are happily also leading cases in the constitutional law of Canada. The principles of British liberty are an all-important part of Canada's goodly heritage. At this very moment Canada is aiding Britain and her allies in a war against militarist Germany on behalf of those principles, as much as on behalf of International law.

There is, I think, no better way to introduce the student to our constitutional law, than by a collection of leading cases. The constitutional law of Canada, pre-eminently, is, in a sense, built up upon the judgments of the Courts; and the object of such a collection as the present is to give concrete reality to the study of the subject, and to shew the student how constitutional questions actually arise, and require to be dealt with. There is this distinction, however, between the cases here collected, and those collected by Mr. Thomas, that

our cases have largely to do with the interpretation of a written fundamental law. So far as our constitution is in a narrow sense Canadian, it is a written constitution, contained in the Federation Act; so far as it is unwritten, it is English.*

A. H.F. L.

Toronto, October 20th, 1914.

* In an appendix are set out certain sections of the British North America Act, 1867.

PREFACE TO SECOND EDITION

Since the publication of the first edition of this book there have been important developments in the application of the principles already dealt with, as well as the emergence of new problems for the student of the Canadian Constitution. The ever-growing importance of Succession Duties in Provincial finance has raised issues as to the scope of the taxation powers of the Provinces and the meaning of "direct taxation." The exclusion of personal property not in fact in the Province, though the property of a domiciled resident, has been followed by the inclusion of property actually in the Province, though owned by one domiciled elsewhere, thus in both ways overruling a long established principle of English law and of the comity of nations. The *King* v. *Lovitt.* Later the method of collection of this tax has raised objections which throw doubt upon the validity of the whole system of these duties as a source of Provincial revenue: *Cotton* v. *Rex.*

The efforts of the Provinces to exercise a control over all companies doing business in the Province, whether incorporated therein or elsewhere, has imposed restrictions on companies incorporated under Dominion authority, which have led to a testing of the Provincial powers in this regard: *John Deere Plow Co.* v. *Wharton,* the effect of which is not yet clearly established. From the opposite angle has come a challenging of the powers of Provincial companies carrying on in another province, which was settled by a recourse to long established but almost forgotten powers of the Crown: *Bonanza Creek Gold Mining Co.* v. *The King.*

The recurrence in the Ottawa Separate Schools of the most acute of all Canada's political and constitu-

tional controversies—that over denominational schools —has made it necessary to include not only the case which determined the issues immediately involved there, but also the two Manitoba cases which most fully elucidate the meaning of sec. 93 of the B. N. A. Act, through the medium of the corresponding section of the Manitoba Act.

The development of the Western Provinces and the tendency there to strike out on new or independent lines has brought into prominence several questions of constitutional importance. In each of the four provinces the claim of a right to grant divorces has been set up and successfully maintained: *Watts* v. *Watts, etc.* The formation of special Commissions with many of the powers heretofore exclusively belonging to the Courts or the endowing of existing officers or bodies with such powers, has raised an important issue as to the extent of the Dominion power of appointment of judges which has not yet received consideration from the final Court. The passing by Manitoba of the Referendum Act has raised what is undoubtedly the most fundamental constitutional question in Canadian history. When a revised Act eliminating the comparatively unimportant objection upon which the Privy Council judgment is based comes to be considered, we shall learn whether we are in truth a self-governing Dominion.

It is somewhat remarkable that the Great War has produced no case in which fundamental issues have been considered. The only case which reached the Supreme Court turned on the wording of two statutes. It is to be regretted that the problem of free speech in time of war did not receive authoritative exposition.

R. F. McW.

Winnipeg, Jan. 1920.

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LEADING CASES

IN

CANADIAN CONSTITUTIONAL LAW

INTRODUCTION

Mr. Thomas introduces his 'Leading Cases in Constitutional Law,' referred to in the Preface, with the words:—"Where there exists a body of laws regulating the distribution and exercise of the supreme power in a community, and a Court entrusted with its interpretation, the term constitutional law has a very definite application. That is the case, for example, in the United States." The same is, also, the case in a lesser degree in Canada. So far as the constitutional law of this Dominion is governed by the British North America Act, these words apply to us; but so far as it is pure English, as it is in fundamentals other than the distribution of legislative power within Canada, Mr. Thomas' next sentence applies to us, as well as to England:—"In England, on the other hand, where there is no written Constitution, this law exists in a much looser shape, and can only be collected from legal decisions, parliamentary precedents, and actual practice."

But even so far as our constitutional law is governed by the British North America Act, it could no more than the Constitution of the United States, be developed and applied without the assistance of the Courts. When the text of our written organic instrument, — the Federation Act — is explicit, it is conclusive; when it is ambiguous, recourse must be had for

its interpretation to the context and scheme of the Act: *Supreme Court References Case* (p. 1). The skeleton framework of the Dominion Constitution had to be clothed with flesh, and nerves, and sinews, by such decisions of the Courts as are contained in this volume.

To begin with, the precise relation of the Crown,—which is spoken of as one and indivisible—to the Dominion, and to the provinces, had to be elucidated: *Attorney-General of Canada* v. *Cain* (p. 3); and especially its relation to the provinces. Do the lieutenant-governors, for example, though appointed by the Governor-General in Council, nevertheless represent the Crown, so that such prerogatives as the right of priority of payment over other creditors will enure to the provincial governments: *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (p. 5).

Again the British North America Act speaks of the legislative powers expressly conferred upon the Dominion parliament and provincial legislatures as 'exclusive.' Does that mean merely 'exclusive' the one of the other; or was the Federation Act assuming to finally divest the Imperial parliament of any future power over the affairs of Canada? The Imperial parliament is a sovereign legislature, and never since *Smiles* v. *Belford* (p. 8) has its paramount authority over and within the Empire been questioned. Its actual exercise is another matter.

Then, beyond all doubt, the Dominion parliament and the provincial legislatures received their powers of legislation from the Imperial parliament under the Federation Act; and a general principle of English law is *delegatus non potest delegare.* It might be aruged that our legislatures only exercised a delegated power, and therefore could not confer the right to exercise any of their powers upon subordinate bodies, until *Hodge* v. *The Queen,* (p. 10) finally established

that their powers are, within the area of their respective jurisdictions, as plenary as those of the parliament at Westminster.

But many of these divisions of legislative powers are cross-divisions. To take a simple example 'marriage and divorce' is assigned to the Dominion parliament to deal with, and yet the 'solemnization of marriage in the province,' which would certainly, on the ordinary understanding of language, fall within the former is said to be exclusively for the provincial legislatures. The Courts had to lay down the principle that section 91 which prescribes the legislative jurisdiction of the Dominion parliament, and section 92 which prescribes that of the provincial legislatures, must be read together, and the language of the one interpreted, and, when necessary, modified by that of the other: *Citizens Insurance Co.* v. *Parsons* (p. 12). And some of the subjects of legislation assigned exclusively to the Dominion undoubtedly fall within the broad subject, assigned to the provinces, of 'property and civil rights in the province.' For example, 'Parliament,' obviously, cannot legislate effectually upon 'banking,' or 'copyrights,' or 'the regulation of trade and commerce,' without affecting property and civil rights in the provinces. But the frame of section 91, especially what is called the *non obstante* clause,—'notwithstanding anything in this Act,'—sufficiently indicates that, in case of direct conflict, Dominion legislation upon any of such subjects as are expressly assigned to it, is to prevail over provincial enactments: *Tennant* v. ***The Union Bank of Canada*** (p. 14).

But quite apart from property and civil rights in the province, the Dominion parliament sometimes cannot effectually and completely legislate upon subjects exclusively assigned to it, without intruding upon the provincial area by enactments ancillary and supplementary to the main subject of its legislation. For

example to legislate completely on bankruptcy law, it must be free to provide for the case of an insolvent person voluntary assigning his assets to a trustee for the benefit of his creditors generally: *Assignment for benefit of creditors case* (p. 16). In such cases, also, the Dominion legislation must prevail, although it does in this way encroach upon the provincial area: *Assignment for benefit of creditors case* (p. 16); *Liquor Prohibition Appeal,* 1895, (p. 22).

And even when the Dominion parliament is not legislating under any of the subjects expressly placed within its exclusive power, but is acting under its broad residuary power, conferred by section 91, to 'make laws for the peace, order, and good government of Canada' in relation to matters not assigned by the Act exclusively to the legislatures of the provinces, it must be free to over-ride provincial legislation in so doing. *A fortiori* such a Dominion Act is not affected in respect of its validity, by the mere fact that it interferes prejudicially with the object and operation of provincial acts: *Russell* v. *The Queen* (p. 24). In short, enactments of the parliament of Canada, in so for as these are within its competency, must always prevail over provincial enactments: *Liquor Prohibition Appeal* 1895 (p. 18).

On the other hand the *non obstante* clause of section 91 already referred to, coupled with the words 'and for greater certainty' which follow it, and with the concluding words of the section, indicate that a provincial legislature cannot under any circumstances legislate upon any of the subjects exclusively assigned to the Dominion, though it does confine its legislation to its own province: *Fisheries case* (p. 20). But there is nothing to prevent the Dominion parliament, when legislating upon one of the enumerated subjects expressly assigned to it, limiting the scope of its legislation to one or more provinces: *Quirt* v. *The Queen* (p. 26).

Another point which arises with regard to the powers of Parliament is, whether,—in view of the exclusive jurisdiction of the provincial legislatures over the administration of justice on the province, and over the constitution of both civil and criminal courts,—Parliament can impose new duties upon, and give new powers to, such Courts as to non-provincial matters. The answer is that it can do so: *Valin* v. *Langlois* (p. 27); and, indeed, there seems no doubt that it can, in matters within its sphere, impose duties upon any Canadians, whether officials or private citizens.

As to provincial powers one thing is clear, and that is that the provincial legislatures possess no powers of legislation except those expressly given to them by section 92 of the Federation Act; *Citizens Insurance Co.* v. *Parsons* (p. 29); and that in this respect, and all others, so far as that Act is concerned, the provinces all stand on the same level, and are in the same position: *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick* (p. 31). But within these limits, the powers of the provinces, cannot be denied merely because they may be abused, or because they may, by their exercise, limit the range which would otherwise be open to the Dominion parliament: *Bank of Toronto* v. *Lambe* (p. 32); and the provincial legislatures themselves have a residuary power of legislation in relation to 'all matters of a merely local or private nature in the province' under No. 16 of section 92: *Liquor Prohibition Appeal* 1895 (p. 78).

Moreover subjects of legislation which in one aspect and for one purpose fall within section 92 of the Federation Act, and, therefore, are within provincial powers, may in another aspect, and for another purpose, fall within section 91, and so some under Dominion jurisdiction: *Hodge* v. *The Queen* (p. 35). And, again, an Act may be in part *ultra vires,* and yet the rest of it may remain unaffected and valid, if the two

parts are separable in their operation and scope: *Dominion Liquor License Acts* (p. 37).

It must always be remembered that there is a broad distinction between a gift by the Federation Act of legislative power, and a gift by it of proprietary rights. The one by no means follows from the other: *The Fisheries case* (p. 38).

So much, then, for questions which arise as to the general interpretation of the Federation Act, especially as regards the scheme of distribution of legislative powers between Parliament and the provincial legislatures. But questions also arise as to the precise import of the terms in which the various subject matters of possible legislation are prescribed in sections 91 and 92. There may have been a very wise and statesmanlike object in describing these in vague general terms. It lends flexibility to the Constitution, and enables limitations of legislative power to be more precisely defined in the light of experience, and of the organic development of our Dominion national life. Thus the meaning had to be determined of that power over 'the regulation of trade and commerce' which is assigned to Parliament exclusively. At any rate it had to be settled whether it included the restricting and regulating of specific trades, so as to debar provincial legislatures from so doing: *Citizens Insurance Co.* v. *Parsons* (p. 40). So again, the Dominion power over 'naturalization and aliens' cannot mean that aliens are in every respect excluded from provincial legislation: *Union Colliery Company* v. *Bryden* (p. 42). Provincial legislatures can certainly refuse the vote even to naturalized aliens, for they have exclusive power over the constitution of their province, except as regards the office of Lieutenant-Governor: *Cunningham* v. *Tomey Homma* (p. 45). Another question which arises is, how far does the power of the Dominion parliament over criminal law extend; are there

any limits to it: *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.* (p. 47); and how far its power over telegraphs and other works and undertakings extending beyond the limits of one province? Can it authorize such a company without the consent of municipalities, to lay down wires and erect poles in cities and towns? The answer is that it can do so: *City of Toronto* v. *Bell Telephone Co.* (p. 49); but, on the other hand, even a Dominion railway does not cease to be part of the province in which it is situated, nor can it claim in all respects to be exempted from the operation of provincial Acts: *Canadian Pacific R. W.* v. *Corporation of Bonsecours* (p. 51): still less can Dominion companies incorporated, as they may be, not under the enumerated exclusive Dominion powers, but under the residuary Dominion power to make laws for the peace, order, and good government of Canada in relation to non-provincial matters. Such companies are always subject to the laws of the province in which they operate: *Citizens Insurance Co.* v. *Parsons* (p. 53); *a fortiori,* is this so, if such a Dominion company confines its operations, as it may do, to a simple province: *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (p. 56).

This Dominion residuary power itself invites questions as to its scope and nature which have not yet been determined. But it seems, at any rate, that its exercise ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance: *Liquor Prohibition Appeal,* 1895 (p. 59).

Then as to provincial powers, 'direct taxation,' in that clause of section 92 which gives provincial legislatures exclusive power over 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' has required judicial definition: *Bank of Toronto* v. *Lambe* (p. 62); and so, also, has the question whether such direct taxation must be imposed upon the whole province, if imposed at all, or

whether it may be imposed, for a local purpose, upon a particular locality only: *Dow* v. *Black* (p. 65). The clause is specific on the point that it must be taxation within the province. Therefore it cannot be levied on property locally situate outside the province: *Woodruff* v. *Attorney-General for Ontario* (p. 67).

Again, the scope of the provincial power over 'municipal institutions in the province' might be supposed, though erroneously, to depend in each province upon what the character of the municipal institutions in that province was before Confederation: *Liquor Prohibition Appeal,* 1895 (p. 69).

So, too, the import of the limitation of the provincial power over the incorporation of companies, that they must be companies 'with provincial objects,' has raised much doubt in judicial minds, not yet finally determined. But at all events a provincial fire insurance company does not seem to be necessarily debarred from contracting outside the province for the insurance of property there situate: *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.* (p. 70).

As to the exclusive provincial power over the solemnization of marriage in the province, we have already pointed out that its scope required definition in view of the exclusive Dominion power over 'marriage and divorce.' It is now clear, however, that it includes the power to enact conditions as to solemnization which may affect the validity of the contract: *In re Marriage Legislation in Canada* (p. 72). But of all the provincial powers that over 'property and civil rights in the province' has, as may have been already gathered, especially exercised the Courts. It seems, according to the latest decision, that to be 'a civil right in the province,' and within the meaning of this clause and the power of the provincial legislature to deal with, it must not also be a civil right outside the province, which would be impaired if the provincial Act were upheld: *Royal Bank of Canada* v. *The King* (p. 75).

So, too, with regard to the exclusive power of legislating upon the subject of education which has by section 93 been given to the legislature of each province, the provision that no such law shall affect any right or privilege with respect to denominational schools which any class of persons had by law in the province at the Union, involved litigation before it was settled what constituted a 'denominational school': *Maher* v. *Town of Portland* (p. 80).

Nor have the sections which deal with the distribution of property between, as it is termed, the Dominion and the provinces,—or, as it should more properly be expressed, between the Crown in right of the Dominion, and the Crown in right of the province—escaped some ambiguity. For example, it had to be determined what comprises a public harbour as 'public harbours' are assigned to the Dominion: *The Fisheries case* (p. 83); while the right to Indian lands, and the exact nature of the Indian title, has produced some famous judgments of the Judicial Committee of the Privy Council: *Indian Lands case* (p. 85); *Indian Claims case* (p. 93); and so has the matter of escheats: *Attorney-General of Ontario* v. *Mercer* (p. 90). One thing above all is important and clear, and that is that the rule of law obtains as between controversial claims of the Dominion and the provinces, as much as between the humblest individuals: *Dominion Treaty Indemnity case* (p. 96).

LEADING CASES IN CANADIAN CONSTITUTIONAL LAW

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR THE DOMINION.

(*Supreme Court References Case*).

[1912] *A. C.* 571.

The Dominion Supreme Court Act contains an enactment that important questions of law or fact touching the interpretation of the British North America Act, 1867, the powers of the Parliament of Canada, or of the provincial legislatures, or any other matter with regard to which the Governor-General in Council sees fit to submit any such question, may be referred by him to the Supreme Court of Canada for hearing and consideration.

The Privy Council had to decide in the above case whether the Dominion parliament had power so to enact; and in deciding that it had, they lay down the following fundamental principles of interpretation of our great constitutional statute:—

"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit, the text is conclusive alike in what it directs, and what it forbids. When the text is ambiguous, as for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be

presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's Dominions outside Canada), or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act.''

There is no possible kind of legislation relating to the internal affairs of Canada, which cannot be enacted either by the Dominion parliament or by the provincial legislatures.

ATTORNEY-GENERAL OF CANADA v. CAIN.

[1906] *A. C.* 542.

In this decision the Judicial Committee affirmed the authority of the Dominion parliament to enact provisions for the deportation from Canada of aliens as provided in the Alien Labour Act. They held that the Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, and to deport him to the country whence he entered it; and that the above Act, assented to by the Crown, had delegated those powers to the Dominion Government. They thus state the position of the Crown in Canada:—

"In 1763 Canada and all its dependencies with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. . . . The Imperial Government might delegate those powers to the Governor or the Government of one of the Colonies either by royal proclamation, which has the force of a statute, or by a statute of the Imperial parliament, or by a statute of a local parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them."

The word "Government" in the above passage is obviously used not in the narrow sense of the Executive, but in the broad sense in which it includes both Executive and legislature.

That "the Crown is one and indivisible and cannot be severed into as many distinct kingships as there are kingdoms" was laid down as far back as *Calvin's case* (1608), 2 State Trials 559.

Note: Although all legislative and executive powers possessed in Canada have been delegated by the Imperial Government, we shall see when we come to *Hodge* v. *The Queen, infra,* p. 10, that those who exercise them do not do so in any sense as mere agents or delegates.

LIQUIDATORS OF THE MARITIME BANK OF CANADA v. THE RECEIVER-GENERAL OF NEW BRUNSWICK.

[1892] *A. C.* 437.

Held, that the provincial Government of New Brunswick being a simple contract creditor of the Maritime Bank of Canada in respect of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches. For the British North America Act, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property and revenues, vested in them respectively. In particular, all property and revenues reserved to the provinces by secs. 109 and 126 are vested in His Majesty as sovereign head of each province.

As the judgment states, at pp. 441-3.

"Their lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial Governments to a central authority, but to

create a federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. . . . By section 58 the appointment of a provincial governor is made by the Governor-General in Council by Instrument under the great seal of Canada, or, in other words, by the Executive Government of the Dominion, which is, by sec. 9, expressly declared 'to continue and be vested in the Queen.' The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion Government.''

'The provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland:' B. N. A. Act 1867, sec. 2.

Note.—In construing the British North America Act it must always be kept in mind that where public land, with its incidents, is described as 'the property

of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial user, or to its proceeds, has been appropriated to the Dominion, or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown. See *St. Catharines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. at p. 56; *infra* p. 87.

SMILES v. BELFORD.

(1876) 23 *Gr.* 590, 1 *O. A. R.* 436

Smiles, who was the holder of a British copyright under the Imperial Copyright Act, 1842, sought, in this action, an injunction to restrain the Belfords, publishers in Toronto, from publishing a reprint of his book called "Thrift" in Canada, notwithstanding the fact that the British North America Act gives the Dominion parliament 'exclusive' legislative authority over 'Copyrights,' and that the Dominion Copyright Act, 1875, required all authors desirous of obtaining copyright in Canada to print and publish and register under that Act, which the plaintiff had not done. The Imperial Copyright Act, 1842, expressly prohibited Her Majesty's colonial subjects from printing or publishing in the colonies, without the consent of the proprietor of the copyright, any work in which there was copyright in the United Kingdom.

Held, that, properly interpreted all the British North America Act does is to place the right of dealing with Colonial copyright within the Dominion under the exclusive control of the parliament of Canada as distinguished from the provincial legislatures, and that Smiles was entitled to the injunction.

All subsequent Canadian decisions have upheld in like manner, the view that the paramount authority of the Imperial parliament has been in no wise lessened by our Federation Act. The point is beyond dispute. The Imperial parliament is a sovereign legislature. In practice, however, and by what we may call constitu-

tional convention, as powerful as any law, its paramount power of legislation is now only exercised by Acts conferring constitutional powers, or dealing with a limited class of subjects of special Imperial or international concern, such as merchant shipping.

Note.—The Imperial Copyright Act, 1842, is now superseded by the Imperial Copyright Act, 1911, which expressly provides that it 'shall not extend to a self-governing Dominion, unless declared by the legislature of that Dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies or necessary to adopt this Act to the circumstances of the Dominion as may be enacted by such legislature:' sec. 25. This Act has not been declared in force in Canada.

HODGE v. THE QUEEN.

(1883) 9 *App. Cas.* 117.

The actual point decided here was that the Ontario legislature had power to entrust to a Board of license commissioners authority to enact regulations in the nature of by-laws, and municipal regulations of a merely local character, for the good government of taverns; and thereby to create offences and annex penalties thereto in the manner purported to be done by the Ontario Liquor License Act.

At pp. 131-2 of the judgment, however, the Judicial Committee use these notable words:—

"It was contended that the Imperial parliament had conferred no authority on the local legislature to delegate those powers to the license commissioners or any other persons. In other words, that the power conferred by the Imperial parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on. It appears to their lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by

delegation from or as agents of the Imperial parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial parliament, or the parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail.''

The plenary nature of the legislative powers of the Dominion parliament and the provincial legislatures within the areas of their respective jurisdictions is thus affirmed; and the Privy Council have repeated their words in many subsequent judgments.

Note.—Many corollaries, besides the power of our legislatures to delegate their functions, follow from this fundamental principle; as, for example, that the law Courts are not concerned with the motives which may have inspired the legislature to pass an Act, further than an enquiry into them may be necessary in order to ascertain the class of subjects of legislation to which the Act in question really belongs; nor are the law Courts concerned with any question of the justice of any particular legislation. See Canada's Federal System, pp. 69-85.

CITIZENS INSURANCE CO. v. PARSONS.

(1881) 7 *App. Cas.* 96.

Held, that a provincial Insurance Act intended to regulate the business of fire insurance companies within the province with a view to securing uniform conditions in their policies fell within No. 13 of section 92 of the British North America Act which enacts that in each province the legislature may exclusively make laws in relation to 'property and civil rights in the province,' and not within No. 2 of section 91 which enacts that the exclusive legislative authority of the parliament of Canada extends to 'the regulation of trade and commerce.'

In their judgment the Privy Council lay down the important principle that section 91 which prescribes the legislative jurisdiction of the Dominion parliament and section 92 which prescribes that of the provincial legislatures, must be read together, and the language of the one interpreted, and when necessary, modified by that of the other.

They say (pp. 108-9) :—"Take as one instance the subject 'marriage and divorce' contained in the enumeration of subjects in section 91: it is evident that solemnization of marriage would come within this description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So 'the raising of money by any mode or system of taxation' is enumerated among the

classes of subjects in section 91; but, though the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other."

As it has been often expressed, the classes of subjects of possible legislation enumerated in sections 91 and 92 of the British North America Act in many cases "overlap,"—or to use an expression of the late Lord Watson, "interlace;" and so, therefore, may Dominion and provincial legislation upon them. In such case neither legislation will be *ultra vires* if the field is clear; but, if the field is not clear, and in such domain the two legislations meet, then, as we shall see from the next decision, Dominion legislation prevails. As to this case of *Citizens Insurance Co.* v. *Parsons,* see further, *infra,* pp. 29, 40, 53.

TENNANT v. UNION BANK OF CANADA.

[1894] *A. C.* 31.

Held, that, inasmuch as warehouse receipts taken by a bank in the course of the business of banking are matters coming within the class of subjects described in section 91 of the British North America Act as 'banking, incorporation of banks, and the issue of paper money,' and thereby assigned to the exclusive legislative authority of the parliament of Canada, the provisions of the Dominion Banking Acts relating to such warehouse receipts are *intra vires,* though modifying civil rights in the province, and conflicting with statutory regulations in Ontario, under provincial Acts, with respect to the form and legal effect in that province of warehouse receipts and other negotiable documents passing the property in goods without delivery.

The Privy Council say (p. 45):—"Section 91 expressly declares that 'notwithstanding anything in this Act,' the exclusive legislative authority of the parliament of Canada shall extend to all matters coming within the enumerated classes, which plainly indicates that the legislation of that parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian parliament. For example, among the enumerated classes of subjects in sec. 91 are 'patents of invention and discovery,' and 'copyrights.' It would be practically impossible for the Dominion parliament to legislate upon either of

these subjects without affecting the property and civil rights of individuals in the province."

This decision, then, establishes the principle that Dominion legislation, so long as it strictly relates to the subjects enumerated in section 91, is of paramount authority even though it trenches upon matters assigned to the provincial legislature by section 92, and on which the provincial legislature has actually legislated. We shall see from our next two cases that Dominion legislation will equally prevail over provincial legislation directly conflicting with it even though the former may not immediately relate to any of the enumerated classes of subjects assigned to Dominion jurisdiction, but be only ancillary to legislation on those subjects; or may not have to do with any of those enumerated subjects at all, but be enactments under the residuary Dominion power to legislate for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces.

Before the laws enacted by the Federal authority within the scope of its powers, the provincial lines disappear; for these laws we have a quasi-legislative union; these laws are the local laws of the whole Dominion, and of each and every province thereof: per Taschereau, J., in *Citizens Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 307.

ATTORNEY-GENERAL OF ONTARIO v. ATTORNEY-GENERAL OF CANADA.

(*Assignment for Benefit of Creditors Case*)

[1894] *A. C.* 189.

Held, that the Ontario Assignments and Preferences Act, which gives voluntary assignments for the benefit of creditors precedence over judgments and executions, is not bankruptcy legislation, because it does not sanction proceedings *in invitum* against an insolvent person to secure a rateable distribution of his assets among his creditors, but is *intra vires* of the provincial legislature under its jurisdiction over property and civil rights in the province, and procedure in civil matters in the province.

The reason for placing this decision among leading cases is to be found in the principle affirmed by the words of the Judicial Committee (at pp. 200-201):— "It appears to their lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion parliament" (*sc.* over 'bankruptcy and insolvency.') They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their lordships do not doubt

that it would be open to the Dominion parliament to deal with such matters as part of a bankruptcy law, *and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion parliament.* But it does not follow that such subjects as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion parliament in existence."

As to the right of the Dominion parliament to intrude upon the provincial area of legislative power to the extent of such ancillary provisions as may be required to prevent the scheme of its own legislation under one of its enumerated powers from being defeated, see *Liquor Prohibition Appeal,* 1895, *infra,* p. 22.

Note.—It makes no difference in respect to the paramount authority of Dominion legislation whether the provincial enactments be prior in date to the conflicting Dominion enactments, or subsequent. See *L'Union St. Jacques de Montreal* v. *Belisle* (1874) L. R. 6 P. C. 31; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896] A. C. at pp. 366-7.

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR THE DOMINION.

(*The Liquor Prohibition Appeal,* 1895.)

[1896] *A. C.* 348.

Held, that the local liquor prohibitions authorised by section 18 of the Ontario Act, 53 Vict. c. 56, entitled 'An Act to improve the Liquor License Act,' are within the powers of the provincial legislature; but that they are inoperative in any locality which adopts the provisions of the Dominion Act, known as the Canada Temperance Act, 1886.

The Privy Council say (pp. 362-5-7) :—"It appears to their lordships that the decision in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation" (*sc.* by local option) "in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada. . . . It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the parliament of Canada, in so far as these are within its competency, must override provincial legislation. . . The question must next be considered whether the provincial enactments of section 18 to any, and if so, to what extent come into collision with the provisions of the

Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it."

This judgment then establishes the principle that Dominion legislation even though not on one of the subjects enumerated in section 91 of the British North America Act, but under the residuary Dominion power to make laws for the peace, order, and good government of Canada upon non-provincial subjects, nevertheless prevails over conflicting provincial enactments.

Note.—This rule as to the predominance of Dominion legislation, it may be confidently said, can only be invoked in cases of absolutely conflicting legislation *in pari materia,* when it would be an impossibility to give effect to both the Dominion and the provincial enactments. Canada's Federal System, pp. 123-7.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR THE PROVINCES.

(*The Fisheries Case.*)

[1898] *A. C.* 700.

Held, that the sections of the Ontario Act of 1892, entitled 'An Act for the Protection of the Provincial Fisheries,' and consisting almost exclusively of provisions relating to the manner of fishing in provincial waters, are *ultra vires,* for the Dominion parliament is given exclusive legislative authority in the matter of Sea Coast and Inland Fisheries by section 91 of the British North America Act, whether it has in fact so legislated with regard to them or not.

This judgment establishes that on the proper interpretation of the British North America Act, provincial legislatures can under no circumstances legislate upon any of the enumerated classes of subjects placed by section 91 under the exclusive jurisdiction of the Dominion parliament, even though that parliament has not itself legislated.

Their lordships say (p. 715):—"The earlier part of this section" (*sc.* section 91, see *infra* p. 100) "read in connection with the words beginning 'and for greater certainty,' appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in section 91 is not within the legislative competence of the provincial legislatures under section 92. In any view the

enactment is express that laws in relation to matters falling within any of the classes enumerated in section 91 are within the 'exclusive' legislative authority of the Dominion parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is in their lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion parliament so legislates. Their lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word 'exclusively.' It would authorise, for example, the enactment of a bankruptcy law, or a copyright law, in any of the provinces unless and until the Dominion parliament passed enactments dealing with those subjects. Their lordships do not think this is consistent with the language and manifest intention of the British North America Act."

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR THE DOMINION.

(*Liquor Prohibition Appeal,* 1895.)

[1896] *A. C.* 348.

We have already had occasion to notice this case (*supra* p. 18) in connection with the general subject of the paramount authority of Dominion legislation.

We have now again to notice it on account of the proposition which is clearly affirmed in it, that the Dominion parliament has the right when legislating upon one of the subject-matters expressly enumerated in section 91 as within its exclusive legislative authority, to intrude upon the provincial area of legislative jurisdiction where such intrusion is necessarily incidental to the exercise of its own express powers.

The Privy Council say (at pp. 359-360) :—

"It was apparently contemplated by the framers of the Imperial Act of 1867, that the due exercise of the enumerated powers conferred upon the parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that 'any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.' . . . It appears to their lordships that the language of this exception in section 91 was meant to include and

correctly describes, all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to their lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the parliament of Canada to deal with matters local and private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerated heads of clause 91. . . . To those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by section 91, has no application; and, in legislating with regard to such matters, the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92."

Thus we see that when legislating, not on one of the classes of subjects specially enumerated in section 91, but under its residuary power to make laws for the peace, order, and good government of Canada in relation to non-provincial matters, the Dominion has no such power to intrude upon the provincial area by such "ancillary legislation." What is known as *The Bell Telephone case* [1905] A. C. 52, affords a striking example of this Dominion power, see *infra,* p. 49.

Note.—When it is sought to find some rule regulating the power of the Federal parliament thus incidentally to deal with matters which are under the jurisdiction of the provinces, it does not appear that any has been, or, perhaps, can be formulated beyond this, that such power does not extend any further than is reasonable to enable it to legislate on the general subjects committed to its jurisdiction by the British North America Act. See Canada's Federal System, pp. 169-179.

RUSSELL v. THE QUEEN.

(1882) 7 *App. Cas.* 829.

The question before the Privy Council in this case was, whether it was competent to the Dominion parliament to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several provinces of the Dominion, or to such parts of the provinces as should locally adopt it. It was contended that the subject of the Act properly belonged to No. 13 of section 92, 'property and civil rights in the province,' which it was said belonged exclusively to the provincial legislature.

Held: that the Act was *intra vires,* for that laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights; and are of a nature which fall within the general authority of the Dominion parliament to make laws for the peace, order, and good government of Canada.

The judgment is included here among leading cases because it lays down the principle that,—although, as we have seen (*supra* p. 23), the Dominion Parliament when legislating under this its residuary power has no authority to encroach upon any class of subjects,—or, in other words, to legislate directly upon any class of subjects—which is exclusively assigned to provincial legislatures by section 92,—this must not be understood to mean that such a Dominion Act is affected in respect of its validity by the mere fact that it interferes

prejudicially with the object and operation of provincial Acts, provided it is not in itself legislation upon or within one of the subjects so assigned to the provinces.

Their lordships say (at pp. 837-9): "It appears that by the statutes of the province of New Brunswick, authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes by granting licenses of the nature of those described in No. 9 of section 92 of the British North America Act, and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the provincial legislature. But, supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subjects described in No. 9, that subsection can in no way interfere with the general authority of the Parliament to deal with that matter. . . . Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assigning to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it."

QUIRT v. THE QUEEN.

(1891) 19 *S. C. R.* 510.

Held that the Dominion Act, 33 Vict. c. 40, which, reciting the insolvency of the Bank of Upper Canada, provided for its winding-up, and for a fair and equitable adjustment and settlement of the claims of all creditors, was *intra vires* as an Act in relation to bankruptcy and insolvency.

Bankruptcy and insolvency is, by No. 21 of section 91 of the British North America Act, a subject within the exclusive legislative authority of the Dominion parliament; and the above decision takes rank as a leading case because it distinctly involves the principle that Dominion legislation may be locally restricted in its operation, and need not extend to the whole Dominion. For, if by virtue of its power to legislate in relation to bankruptcy and insolvency, parliament can provide for the winding-up in insolvency of a single institution, it would seem to follow *a fortiori* that it can confine the scope of its bankruptcy and insolvency legislation within any territorial limits it sees fit.

The words of the Privy Council in *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L. R. 6 P. C. at p. 36, are referred to by some of the judges in the above case as supporting their view.

The British North America Act divides legislative power between the provinces and the Dominion, not with reference to the area to which the legislation is to apply, but with reference to the subject-matter of that legislation.

VALIN v. LANGLOIS.

(1879) 5 *App. Cas.* 115.

In this case the Privy Council refused leave to appeal from the judgment of the Supreme Court of Canada which had held unanimously that the Dominion Controverted Elections Act, 1874, which conferred upon the provincial Courts jurisdiction with respect to controverted elections to the Dominion House of Commons, was *intra vires.* In so doing their lordships state that there is nothing in the British North America Act to raise a doubt about the power of the Dominion parliament to impose new duties upon the existing provincial Courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces.

This judgment affirms a principle which Sedgwick, J., in *In re Vancini* (1904), 34 S. C. R. 621, delivering the judgment of the Supreme Court, expands into the general proposition that "the Dominion parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of provincial Courts, other officials, or private citizens.

So the Privy Council have held that the Dominion parliament can impose upon a municipality the duty of contributing to the cost of protecting, by gates or otherwise, level crossings of railways subject to Dominion jurisdiction: *City of Toronto* v. *Canadian Pacific Railway Company* [1908] A. C. 54.

Note.—It would appear that, in matters within their sphere, provincial legislatures can impose duties

upon Dominion officials in certain cases; for, in *In re County Courts of British Columbia* (1872), 21 S. C. R. 446, it was held by the Supreme Court of that province that the provincial legislature had power, under No. 14 of sec. 92 of the British North America Act, to enact that, until a County Court judge of Kootenay had been appointed, the judge of the County Court of Yale should act as such.

CITIZENS INSURANCE CO. v. PARSONS.

(1881) 7 *App. Cas.* 96.

We have already noticed this case on account of one important principle laid down by the Privy Council in it. See *supra* p. 12. We have now to notice it on account of another, namely, this—that the provincial legislatures have no powers except the enumerated powers given to them by section 92 of the British North America Act. Their lordships say (at p. 109) :—

"The first question to be decided is, whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *primâ facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes in section 91, and whether the power of the provincial legislature is or is not thereby overborne."

They speak in the same way again in *Russell* v. *The Queen* (1882) 7 App. Cas. at p. 836, noticed *supra,* p. 24.

Note.—Apart, however, from law-making powers, provincial legislatures have, by virtue of being legislative bodies at all, such powers and privileges as are necessarily inherent in and incident to such bodies; or, in other words, whatever, in a reasonable sense, is necessary to the existence of such a body, and the

proper exercise of the functions which it is intended to execute, *e.g.*, removing any obstruction offered to its deliberations. Moreover the power to amend the provincial Constitution given to the provincial legislatures by No. 1 of section 92 of the British North America Act, 1867, includes power to pass Acts for defining their own powers and privileges in this respect: *Fielding* v. *Thomas* [1896] A. C. 600, at pp. 610-1.

LIQUIDATORS OF THE MARITIME BANK OF CANADA v. THE RECEIVER-GENERAL OF NEW BRUNSWICK.

[1892] *A. C.* 437.

We have already had occasion to notice this case (*supra* p. 5) on account of the light which it throws upon the relation of the Crown to the provinces under the British North America Act. We must now notice it again on account of an important principle which it lays down in the following words at p. 442:—

"The Act places the Constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick."

Co-equal and co-ordinate legislative powers in every particular were conferred by the British North America Act on the provinces.

Note.—There is to be found in some of the earlier cases, a somewhat confused and confusing notion that in considering the provisions of the British North America Act in respect to the distribution of legislative power between the Dominion and the provinces, we may sometimes have to go behind and beyond its terms, and consider what the representatives of the confederated provinces intended when they consented to enter into the Union, or the powers of legislation they then possessed, and the manner in which they were wont to exercise them. But it may now be regarded as established that the British North America Act itself is the sole charter by which the rights claimed by the Dominion and the provinces respectively can be determined. When once enacted it constituted a wholly new point of departure. Canada's Federal System, pp. 14-19.

BANK OF TORONTO v. LAMBE.

(1887) 12 *App. Cas.* 575.

Held that a provincial Act imposing a direct tax upon banks carrying on business within the province was *intra vires* under No. 2 of section 92 of the British North America Act, whereby provincial legislatures have exclusive power to make laws in relation to 'direct taxation within the province in order to the raising of a revenue for provincial purposes;' and this in spite of the fact that provincial legislatures might lay on taxes so heavy as to crush a bank out of existence, and so nullify the power of the Dominion parliament to erect banks under its exclusive legislative authority over ' banking, incorporation of banks, and the issue of paper money' given by No. 15 of section 91.

This decision takes rank as a leading case, not only on account of its interpretation of what is meant by 'direct taxation,' with which we are not now concerned (see *infra,* p. 62), but because of the principle thus laid down at p. 587 of the judgment:—

"If their lordships find that on the due construction of the British North America Act a legislative power falls within section 92," (under which the provincial legislatures get their powers), "it would be quite wrong of them to deny its existence because by some possibility it may be abused, *or may limit the range which otherwise would be open to the Dominion parliament.*"

The position seems to be this: although when provincial legislation and Dominion legislation directly

conflict with each other, the latter must prevail (see *supra,* pp. 14-19), and although the construction of the enumerated powers conferred upon the Dominion parliament by section 91, may be said to over-ride the construction of section 92, under which the provincial legislatures get their powers (see *supra* p. 12), yet the provinces under our Constitution have not, as the several States of the Union and of the Commonwealth of Australia have, a general power of legislation subject only to certain specified powers which they themselves have conferred upon the Federal body; but they, as well as the Dominion, have received from one and the same source, namely, the Imperial parliament, certain express powers of legislation upon specified subjects, which are theirs exclusively; and therefore, their power to legislate upon these specified subjects cannot be denied, as is the case with the States, merely because in doing so they may interfere with or restrict the range of Federal legislation. But, on the other hand, the Dominion Government possesses, what neither the United States Government, nor the Commonwealth Government of Australia possess, namely, a veto power over all provincial legislation.

This contrast with the United States Constitution is developed in the judgment of the Privy Council. *Cf. Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* [1914] A. C. 237, at pp. 252-4.

Thus a provincial legislature may authorise a direct tax upon the salary of a Federal officer: *Abbott* v. *City of St. John* (1908), 40 S. C. R. 597; provincial legislatures may require brewers, and distillers, though duly licensed by the Dominion Government, to take out and pay for provincial licenses also: *Brewers and Maltsters Association of Ontario* v. *Attorney-General of Ontario* [1897] A. C. 231.

Note.—It may be said, with confidence, that under the growth of constitutional practice, the veto power of the Dominion Government over provincial legislation has ceased to be exercised upon the ground of unjust interference with vested rights. Unwise or unprincipled legislation are matters for the electorate of the province. It also seems unlikely that the Federal Government will hereafter disallow provincial Acts merely on the ground that they are *ultra vires.* This is matter for the Courts. But the veto power continues to be exercised to protect important Dominion and Imperial interests, as, for example, in the case of provincial Acts discriminating against foreign immigrants and resident aliens. Canada's Federal System, pp. 30-50.

HODGE v. THE QUEEN.

(1883) 9 *App. Cas.* 117.

This is another decision of the Privy Council which has already been referred to (*supra* p. 10). It has however, a further claim to rank as a leading case, in that in the judgment is, for the first time, formulated the following principle as regards legislative power under the Federation Act.

At p. 130 their lordships say:—"The principle which the case of *Russell* v. *The Queen* (*supra* p. 24), and the case of *Citizens Insurance Co.* v. *Parsons* (*supra* p. 12) illustrate, is that subjects which in one aspect and for one purpose fall within section 92 of the British North America Act, may in another aspect and for another purpose fall within section 91."

In other words, whether a particular Act falls within Dominion or provincial legislative power may depend on the aspect of the legislation embodied in it, —that is to say, on the aspect or point of view of the legislature, — the object, purpose, and scope of the legislation.

What their lordships are pointing out in the passage above referred to, is that it was a mistake to suppose that because, in *Russell* v. *The Queen,* they had held that the Canada Temperance Act, 1878, which abolished all retail transactions between traders in liquor and their customers within every provincial area in which its enactment had been adopted by the majority of the local electors as in the Act provided, and which, viewed in its proper aspect, and with reference

to its proper purpose, was a general Act relating to public order and safety, and good morals in the Dominion, fell within the powers conferred upon the Dominion parliament by section 91 of the British North America Act, to make laws for the peace, order, and good government of Canada, therefore it followed that the whole subject of the liquor traffic was given to the Dominion, and consequently taken away from the provincial legislatures, and that therefore the Liquor License Act of Ontario, which was confined in its operation to municipalities in Ontario, and entirely local in its character and operation, was necessarily *ultra vires.* On the contrary, as we have seen (*supra* p. 18), they held it to be *intra vires.*

'All experience shows that the same measure or measures scarcely distinguishable from each other may flow from distinct powers; but this does not prove that the powers themselves are identical:'' Pomeroy on Constitutional Law, 1st ed. at p. 218.

Note.—It may be said to follow as a necessary corollary from the above principle, that as the Privy Council say in *Russell* v. *The Queen* (*supra* p. 24):—''The true nature and character of the legislation in the particular instance under discussion—its ground and design, and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law.''

DOMINION LIQUOR LICENSE ACTS, 1883-4.

(1885) 4 *Cart.* 342, n.

This was a special case which came before the Judicial Committee of the Privy Council by way of appeal from the Supreme Court of Canada. Their lordships gave no reasons for their judgment, or report, but it ranks among leading constitutional decisions because of the passage in it which embodies the principle that although part of a Dominion or provincial Act may be *ultra vires,* and, therefore, invalid, this will not invalidate the rest of the Act, if it appears that the one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be attained by a partial execution.

Their lordships say in their report that the Dominion Liquor License Acts in question "are not within the legislative authority of the parliament of Canada. The provisions relating to adulteration, if separated in their operation from the rest of the Acts, would be within the authority of the parliament; but as in their lordships' opinion they cannot be so separated, their lordships are not prepared to report to Her Majesty that any of these Acts is within such authority."

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR THE PROVINCES.

(*The Fisheries Case*).

[1898] *A. C.* 700.

Again we have to refer to a case already referred to in connection with one of the principles embodied in the judgment (*supra* p. 20). It claims further mention here, however, on account of the distinction which the Privy Council draw in it between a gift by the British North America Act of legislative power and a gift by it of proprietary rights.

Their lordships say, at pp. 709-711:—"It must be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were, at the time of the passing of that Act, possessed by the provinces, remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada."

And so the judgment held that the Dominion parliament, although given exclusive legislative authority by No. 12 of section 91 over 'Sea Coast and Inland

fisheries,' could not by virtue of that authorise the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in fisheries vested in private individuals or in the provinces, for the 91st section did not convey to the Dominion any proprietary rights in relation to fisheries.

Note.—In the same way the fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the parliament of the Dominion by No. 24 of section 91, is not in the least degree inconsistent with the right of the provinces to a beneficial interest in those lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title: *St. Catharines Milling and Lumber Co.* v. *The Queen* (1888) 14 App. Cas. 46. See *infra,* p. 85.

CITIZENS INSURANCE CO. v. PARSONS.

(1881) 7 *App. Cas.* 96.

We have already recognised two claims of *Citizens Insurance Co.* v. *Parsons* to rank among leading cases (*supra* pp. 12, 29). We must now recognise yet a third, namely, as the leading decision upon the scope of the Dominion exclusive power over 'the regulation of trade and commerce' given by No. 2 of section 91 of the British North America Act.

Their lordships found it absolutely necessary that the literal meaning of these words 'regulation of trade and commerce' should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures, for taken in their widest sense they would authorise legislation by the parliament of Canada in respect of several of the matters specially enumerated in section 92 and would seriously encroach upon the local autonomy of the provinces.

And so they say (p. 112), that the words—"may have been used in some such sense as the words 'regulations of trade' in the Act of Union between England and Scotland, 6 Anne c. 11, Article 6 of which enacted that all parts of the United Kingdom, from and after the Union, should be under the same 'prohibitions, restrictions and regulations of trade.' Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms."

They come to the conclusion that 'regulation of trade and commerce' in No. 2 of section 91 includes—

"Political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and may perhaps include general regulations of trade affecting the whole Dominion, but it does not comprehend the power to regulate by legislation the contracts of a particular business or trade (such as the business of fire insurance) in a single province."

Their lordships, however, expressly say that they abstain from any attempt to define the limits of the authority of the Dominion parliament in this direction; and although the Privy Council have had occasion to refer to their language here in two subsequent cases, and the matter has come up for discussion elsewhere, the precise determination of the scope of the Dominion power in question can scarcely be said to have been much advanced. There have been very numerous decisions in Canadian Courts holding provincial legislation of a local, sanitary, or police character, valid, notwithstanding any effect it might have on particular trades. See Legislative Power in Canada, pp. 455-6; Canada's Federal System, p. 236, n.

UNION COLLIERY COMPANY v. BRYDEN.

[1899] *A. C.* 580.

John Bryden, a shareholder in the Union Colliery Company of British Columbia, brought this action against the company asking for a declaration by the Court that the company had no right to employ Chinamen in certain positions of trust and responsibility, or as labourers in their mines below ground, and that such employment was and is unlawful, and for an injunction restraining the company from so doing. He relied on section 4 of the British Columbia Coal Mines Regulation Act, 1890, which enacted as follows:—

'No boy under the age of twelve years, and no woman or girl of any age, and no Chinaman shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground.'

The company contended, in their defence, that this enactment was *ultra vires* so far as it related to adult Chinamen, as trespassing upon the exclusive legislative authority of the Dominion parliament over 'naturalization and aliens' under No. 25 of section 91 of the British North America Act.

The case came before the Privy Council on appeal from the Supreme Court of British Columbia, which had held the validity of the enactment in question, and granted the injunction asked. Their lordships' judgment in this, and the next case, *Cunningham* v. *Tomey Homma* (*infra* pp. 45, 46) are leading decisions on the scope and interpretation of this Dominion power, at all events so far as regards aliens. They

held the provisions of the enactment in question, as regards Chinamen, invalid, saying:—

"They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments it would be difficult to dispute that they were within the competency of the provincial legislatures, either by virtue of section 92, sub-sec. 10" (*sc.* as a law in relation to 'local works and undertakings') "or section 92, sub-sec. 13" (*sc.* as a law in relation to 'property and civil rights in the province.') "But the leading feature of the enactments consists in this, that they have, and can have, no application except to Chinamen who are aliens or naturalised subjects; and that they establish no rule or regulation except that these aliens or naturalised subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia. Their lordships see no reason to doubt that, by virtue of section 91, sub-section 25, the legislature of the Dominion is vested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are, also, of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consist in establishing a statutory prohibition which affects aliens or naturalised subjects, and therefore trench upon the exclusive authority of the parliament of Canada."

Note.—In their subsequent judgment in *Cunningham* v. *Tomey Homma* (*infra* p. 45), their lordships refer to this decision in the *Union Colliery Company case,* and say:—"This Board dealing with the particular facts of that case, came to the conclusion that

the regulations there impeached were not really aimed at the regulation of coal mines at all, but were, in truth, devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

CUNNINGHAM v. TOMEY HOMMA.

[1903] *A. C.* 151.

Tomey Homma was a naturalised Japanese, and claimed to be placed upon the register of voters for the electoral district of Vancouver City, and the objection was made to his claim that by the electoral law of the province it was enacted that no Japanese, whether naturalised or not, should have his name placed on the register of voters, or be entitled to vote. Application was made to the proper officer to enter Tomey Homma's name on the register, but he refused to do so on the above grounds. This refusal was over-ruled by the Chief Justice sitting in the County Court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. This appeal to the Privy Council followed.

Their lordships say in their judgment that sub-section 25 of section 91 "does not purport to deal with the consequences of either alienage or naturalisation. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other; but the question as to what consequences shall follow from either is untouched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalisation; but the privileges attached to it, where these depend upon residence, are quite independent of nationality."

They, therefore, decided against Tomey Homma's right to vote, holding the provincial act *intra vires,* placing it, apparently, under No. 1 of section 92 of the

British North America Act, whereby the Constitution of the province, and any amendments of it, are placed under the exclusive control of the provincial legislature.

Note.—The net result of the Privy Council judgment in this and the last case, seems to be that the provincial legislatures cannot legislate against aliens, whether before or after naturalisations, merely as such aliens, so as to deprive them of the ordinary rights of the inhabitants of the province; although they might so legislate against them as possessing this or that personal characteristic or habit, which disqualifies them from being permitted to engage in certain occupations, or enjoy certain rights generally enjoyed by other people in the province. The Dominion parliament alone can legislate in relation to them merely as aliens. But it is a different matter when rights and privileges which have to be specially conferred are in question, such as the right to exercise the franchise. It is within the power of provincial legislatures to refuse to confer such rights upon aliens, or any other class of people in the province.

ATTORNEY-GENERAL FOR ONTARIO v. HAMILTON STREET R. W. CO.

[1903] *A. C.* 524.

This matter came up in the form of certain questions referred to the Court of Appeal for Ontario by the Lieutenant-Governor of the province, under the authority of a provincial statute, one of which questions was—

'Had the legislature of Ontario jurisdiction to enact chapter 246 of the Revised Statutes of Ontario, 1897, intituled 'An Act to prevent the profanation of the Lord's Day?'

The Court of Appeal answered this question in the affirmative, and the present appeal was from their judgment to the Privy Council. The respondents were a number of railway companies, and others, who sought to escape from the restrictions placed upon them by the Act.

Their lordships' judgment is a leading decision upon the scope of that power over 'Criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters,' which No. 27 of section 91 of the British North America Act confers upon the Dominion parliament exclusively.

Holding the Ontario Act in question "treated as a whole" to be *ultra vires* as being legislation upon criminal law, they say:—"The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification.

Those words seem to their lordships to require, and, indeed, to admit, of no plainer exposition than the language itself affords. . . . It is the criminal law in its widest sense that is reserved. . . . The fact that from the criminal law generally there is one exception, namely, 'the constitution of Courts of criminal jurisdiction,' renders it more clear, if anything were necessary to render it more clear, that with that exception . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion."

Note.—But although criminal law is thus within Dominion jurisdiction exclusively, yet by No. 15 of section 92 of the B. N. A. Act, 1867, provincial legislatures have power to make laws for the imposition by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in section 92. By virtue of this power, in connection especially with No. 13 (property and civil rights in the province) and No. 16 (matters of a merely local or private nature in the province), many provincial penal Acts have been passed, which have sometimes been spoken of as 'provincial criminal law,' and very often as 'police regulation,' and deal with such matters as the closing of stores and cessation of trade on Sundays, or the regulation of liquor traffic. Such Acts may even deal in a merely local aspect with the same things as the Dominion parliament legislating in a general aspect may embrace in the criminal law. See *supra* p. 35, and Canada's Federal System, pp. 580-627.

CITY OF TORONTO v. BELL TELEPHONE CO.

[1905] *A. C.* 52.

In this action the Bell Telephone Company of Toronto claimed the right under their incorporating Act which was passed by the Dominion parliament, and expressly authorised them so to do, to enter upon the streets and highways of the City of Toronto, which were vested in the municipal corporation under the Ontario Municipal Act, and to construct conduits or cables thereunder, or to erect poles and affix wires thereto upon or along such streets or highways without the City's consent.

The Dominion Act of incorporation rested upon that power to make laws in relation to 'lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province,'—which is conferred upon the Dominion parliament exclusively by No. 29 of section 91, read in connection with No. 10 of section 92 of the British North America Act.

The Privy Council held, affirming the decision of the Ontario Court of Appeal, that the Dominion Act in question was *intra vires,* and that "the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and no provincial legislature was, or is competent to interfere with its operations, as authorised by the parliament of Canada." They held, accordingly, that a provincial Act making the consent of the municipal council a condition precedent to the exercise of the company's powers in cities, towns, and incorporated villages was *ultra vires;* and that under its said Act of incorporation, the company was entitled, without the consent of

the municipality, to enter upon the streets and highways of Toronto, and prosecute their operations in the way claimed.

This decision, then, affirms and illustrates the proposition that a Dominion company incorporated to carry out such an undertaking as comes within one of the enumerated classes of subjects assigned to the exclusive legislative authority of the Dominion parliament by section 91 of the British North America Act is not subject, in carrying on the business authorised by its charter, to the provincial laws of the province where it does so.

So a power conferred by a provincial legislature on an industrial company to carry on its corporate enterprise to the exclusion of every other company in a designated territory, is without effect against a company lawfully constituted for similar ends by a previous statute of the Dominion parliament under its enumerated powers: *La Compagnie Hydraulic de St. Francois* v. *Continental Heat and Light Co.,* [1909] A. C. 194. And for the purpose of a Dominion railway company, the Dominion parliament has power to dispose even of provincial Crown lands, as, for example, of a provincial foreshore to a harbour: *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.,* [1906] A. C. 204.

Note.—The position is entirely different, as we shall see, when the Dominion parliament is incorporating, not under one of its enumerated powers, but under its residuary power to make laws for the peace, order, and good government of Canada upon non-provincial subjects. *Infra* p. 54. Furthermore it must not be inferred that a Dominion company, even when incorporated under one of the specially enumerated Dominion powers of section 91 of the B. N. A. Act, 1867, can in no way be touched or affected by provincial legislation. Our next case will shew the contrary.

CANADIAN PACIFIC R. W. CO. v. CORPORATION OF BONSECOURS.

[1899] *A. C.* 367.

On June 3rd, 1896, the rural inspector of the parish of Notre Dame de Bonsecours, in the province of Quebec, served the Canadian Pacific Railway Company with notice, under the Quebec Municipal Code, requiring it within eight days to clean and keep in good order and free from obstruction a ditch alongside a piece of the track of the railway, where it ran along a piece of ground belonging to Julien Gervais, from which it was separated by a hedge, which was the boundary of the railway, and the property of the railway company. The company, however, did not comply with the notice, and the corporation of the parish brought an action against them in the Superior Court of the province setting out the facts, and claiming an order against the railway company to pay $200 on account of their non-compliance with the notice. The company contended, in its defence, that the regulation of such matters as were covered by the notice served, belonged to the Dominion parliament, and not to the provincial legislature.

The Superior Court decided against the railway company, and in favour of the municipal corporation, a decision which the Quebec Court of Queen's Bench affirmed; from which this appeal to the Privy Council was unsuccessfully taken by the railway company.

Their lordships say (pp. 372-3):—"The British North America Act, whilst it gives the legislative control of the appellant's railway, *qua* railway, to the parliament of the Dominion, does not declare that the railway shall cease to be part of the province in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly the parliament of Canada has,

in the opinion of their lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes," (see *infra* p. 62) . . . "It, therefore, appears to their lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorised works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec": and they read the enactment, or rather the notification to the railway company given under it, as embracing the latter purpose only.

Note.—On the other hand a provision of a provincial Cattle Protection Act that a Dominion railway company shall be responsible for cattle injured or killed on the railway, unless it erects proper fences on its railway, will be *ultra vires*. This amounts to a provision that there shall be a liability on the railway company unless it creates such and such works upon its roadway; and so is manifestly beyond the jurisdiction of the provincial legislature: *Madden* v. *Nelson and Fort Sheppard R. W. Co.* [1899] A. C. 626. The relation between federal railways and provincial legislation is fully gone into in Canada's Federal System, pp. 339-364.

CITIZENS INSURANCE CO. v. PARSONS.

(1881) 7 *App. Cas.* 96.

William Parsons brought an action against the Citizens Insurance Company of Canada upon a policy of fire insurance issued by it. The defence of the company was that, by not disclosing a previous insurance upon the property, Parsons had committed a breach of one of the conditions of the policy, and was not entitled to recover. Parsons replied that by reason of non-compliance by the company with certain provisions of an Ontario Act, intituled 'an Act to secure uniform conditions in policies of insurance,' the company's policy must be taken as issued without any conditions at all. The company, thereupon, contended that having, as the fact was, been originally incorporated before Confederation by the parliament of the late province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion parliament, it could not be affected by Ontario legislation.

The Privy Council now decided, reversing the judgments of the Courts below, that upon the proper construction of the Ontario Act, the policy must be held to have been subject to certain statutory conditions in that Act contained; and that Parsons' non-disclosure of such previous insurance was a breach of those statutory conditions, and therefore his action failed.

We have already had occasion to notice this important judgment of the Privy Council more than once, on account of leading principles embodied in it. It has been noticed again here, as the leading authority on the power of the Dominion parliament to incorporate

companies, other than 'companies with provincial objects' (as to which see *infra* pp. 70-1), under its residuary power to make laws for the peace, order, and good government of Canada in relation to non-provincial matters; and on the point that such Dominion companies, unlike those incorporated under the enumerated Dominion powers, can only operate in any province subject to the laws of that province.

Their lordships say, at pp. 116-7:—It is not necessary to rest the authority of the Dominion parliament to incorporate companies on the specific and enumerated power to regulate trade and commerce," (see *supra* p. 40). "The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being 'the incorporation of companies with provincial objects,' it follows that the incorporation of companies for objects other than provincial falls within the general powers of the parliament of Canada. But it by no means follows (unless indeed the view of Taschereau, J., is right as to the scope of the words 'regulation of trade and commerce,')[1] that, because the Dominion parliament has alone the right to create a corporation to carry on business throughout the Dominion, it alone has the right to regulate its contracts in each of the provinces. Supposing the Dominion parliament were to incorporate a company, with power among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended that if such

[1] Taschereau, J., had held in the Court below that the power of the Dominion parliament to incorporate companies to carry on business in the Dominion is derived from 'the regulation of trade and commerce,' one of the enumerated classes of subjects in section 91 of the B. N. A. Act, 1867, assigned to the Dominion parliament exclusively. See *supra*, pp. 40-1.

a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over property and civil rights in that province), that it could hold land in that province, in contravention of the provincial legislation; and, if the company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

COLONIAL BUILDING AND INVESTMENT ASSOCIATION v. ATTORNEY-GENERAL OF QUEBEC.

(1883) 9 *App. Cas.* 157.

The Attorney-General of the province of Quebec petitioned the Superior Court of that province for a declaration that the Colonial Building and Investment Association had been and was illegally formed and incorporated, and for an order dissolving it. The association was incorporated by Dominion Act in 1874 with a general power to deal in lands and buildings, but had limited its operations to the province of Quebec, and the Attorney-General, in his petition, contended that because of this, and because the operations and business of the company were of a merely local and private nature in the province, and had provincial objects affecting property and civil rights in that province, the company could not be lawfully incorporated except by the authority of the provincial legislature, to which the exclusive power of incorporation of companies with provincial objects is given by No. 11 of section 92 of the British North America Act (see *infra* p. 70).

The Quebec Court of Queen's Bench on appeal to it from the Superior Court, while holding the Act of incorporation of the company valid, held that, nevertheless, it had no right to act as a corporation in respect to its land operations, or in respect to any matter of property and civil rights, or any objects of a purely local or private nature within the province of Quebec.

The Privy Council now reversed this judgment, and say (pp. 164-6) :—

"Their lordships cannot doubt that the majority of the Court of Queen's Bench was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board in *Citizens Insurance Company* v. *Parsons,* put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed," (see *supra* pp. 54-5), "their lordships adhere to the view then entertained by them as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies. It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the Association had confined its operations to the province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the provincial legislature. But surely the fact that the Association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the Association was originally within the legislative power of the Dominion parliament. The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation nor warrant the judgment prayed for, namely, that the company be declared to be illegally constituted. . . . It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. . . . It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of section 92 of the British North America Act,

namely, 'property and civil rights in the province,' and belongs exclusively to the provincial legislature, so that the Dominion parliament could not confer powers on the company to override it. But the powers found in the Act of incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, namely, throughout the Dominion. Among other things, it has given the Association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it the Act of incorporation gives it capacity to do so."

This case, therefore, is a leading one on the point that a Dominion corporation with power to conduct its operations anywhere in the Dominion, may, nevertheless, restrict them to a single province. But if the Act under which it is incorporated rests, not upon any of the exclusive Dominion powers enumerated in section 91 of the British North America Act, but upon the residuary Dominion power conferred by that section over all non-provincial matters, then such company can only operate in any province subject to the laws of that province.

ATTORNEY-GENERAL OF ONTARIO v. ATTORNEY-GENERAL OF THE DOMINION.

(*Liquor Prohibition Appeal,* 1895).

[1896] *A. C.* 348.

We have already twice (*supra* pp. 18, 22) recognised the claim of the important judgment of the Privy Council in this case to rank as a leading decision. It has yet a third claim in the light it throws upon the proper understanding of that general residuary power to make laws for the peace, order, and good government of Canada in relation to non-provincial matters, which is conferred upon the Dominion parliament by section 91 of the British North America Act.

At pp. 360-2 their lordships say:—

"These enactments" (*sc.* those contained in section 91) "appear to their lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the parliament of Canada by section 91, would, in their lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the parliament of Canada has authority to make

laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures. . . . Their lordships do not doubt that some matters, in their origin, local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and, therefore, within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province, would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their lordships conceive, might be competently dealt with by the parliament of the Dominion."

The Privy Council formulated and reiterated the propositions thus laid down by them, in their subsequent judgment of *City of Montreal* v. *Montreal Street Railway* [1912] A. C. at pp. 343-4.

Note.—The possible scope and range of this residuary Dominion power of legislation have by no means been determined as yet. Lord Davey is reported to have suggested in the course of the argument before

the Judicial Committee in *Fielding* v. *Thomas* (*supra* p. 30) that, by virtue of it, the Dominion parliament might, perhaps, even change the federal Constitution itself though not, of course, the Constitutions of the provinces or the provincial powers. See Legislative power in Canada, p. 699, n. 1. In the *Riel* case (1885) 10 App. Cas. 675, their lordships say that the words in which it is conferred in section 91 are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to quite irrespective of the English common law or legislation. There is special significance in the word 'order' in the phrase 'peace, order, and good government.' It places in the hands of the federal power of the Dominion, the right and responsibility of maintaining public order throughout Canada.

BANK OF TORONTO v. LAMBE.

(1887) 12 *App. Cas.* 575.

We have already placed this among leading cases (*supra* p. 32) on account of its having established the plenary character of the powers of provincial legislatures within the limits prescribed to them. We have now, again, to do so on account of the interpretation it contains of what is to be understood as 'direct taxation' in No. 2 of section 92 of the British North America Act, which places within the exclusive jurisdiction of provincial legislatures, 'direct taxation within the province in order to the raising of a revenue for provincial purposes.'

Their lordships say, at pp. 581-4:—

"First, is the tax a direct tax? For the argument of this question, the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, namely:—What the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it. . . . The legislature cannot possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases. It must have contemplated some tangible dividing line, referable to, and ascertainable by the

general tendencies of the tax, and the common undertaking of men as to those tendencies. After some consideration, Mr. Kerr chose the definition of John Stuart Mill, as the one he would prefer to abide by. That definition is as follows:—'Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise and customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.' It is said that Mill adds a term—that to be strictly direct, a tax must be general; and this condition was much pressed at the bar. Their lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature. Their lordships then take Mill's definition, above quoted, as a fair basis for testing the character of the tax in question, not only, because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems

to them, to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act. Now, whether the probabilities of the case, or the frame of the Quebec Act" (see supra p. 32) "are considered, it appears to their lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it."

Note.—The Privy Council have repeated and reaffirmed this description of direct taxation in their subsequent judgments in *Brewers and Maltsters Association of Ontario* v. *Attorney-General of Ontario* [1897] A. C. 231, as to which see *supra* p. 33; and *Cotton* v. *Rex* [1914] A. C. 176, where they held that the taxation imposed by the Quebec Succession Duties Act, 1906, was not 'direct taxation' within the meaning of the clause in question, and where reviewing the previous decisions, they say:—"Their lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in sec. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

DOW v. BLACK.

(1875) *L. R.* 6 *P. C.* 272.

Prior to Confederation in 1867 the Houlton Branch Railway company had been incorporated by the legislature of New Brunswick with power to construct a railway from Debec in the province of New Brunswick to the boundary line between that province and the State of Maine. After Confederation the New Brunswick legislature passed an Act purporting to authorise the inhabitants of the lower district of the parish of St. Stephen in the province to raise $15,000, by the issue of debentures, to be retired by assessment of the real and personal property of all persons resident in the district, to the intent that the money so raised might be given as a bonus to the railway company. On April 14th, 1871, a warrant was issued by the Justices of the Peace at the General Sessions for the County of Charlotte, in which St. Stephen is, to James Dow and others, the assessors of the parish, commanding them to levy and assess on the ratepayers of the lower district of St. Stephen $958.50 to pay interest on the said debentures. They accordingly assessed the ratepayers, amongst whom was Black, and the collector of rates applied to him for payment, which he refused; and, thereupon, with other ratepayers, applied for and obtained a writ of *certiorari* to remove into the Supreme Court of the province the warrant of assessment and the accompanying documents. Upon return to the writ, Black and his associates obtained a rule *nisi* to quash the warrant and assessment on the ground that the provincial Act was *ultra vires*, a

contention which the Supreme Court of the province upheld, and granted the relief asked. This appeal was then taken to the Privy Council.

It was contended that No. 2 of section 92, set out *supra* p. 32, only authorises direct taxation incident on the whole province for the general purposes of the province.

The Privy Council, however, say:—"Their lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province."

Note.—It has been well said that this decision is sufficient warrant for the whole system of municipal taxation now operative throughout Canada.

WOODRUFF v. ATTORNEY-GENERAL FOR ONTARIO.

[1908] *A. C.* 508.

The Attorney-General for Ontario brought action against the executors of Samuel De Veaux Woodruff, deceased, to recover succession duty alleged by him to be payable to the province by virtue of the Ontario Succession Duty Act upon personal property forming part of the estate of the deceased. Woodruff died in 1904, and the property in question consisted of certain bonds and debentures which at the time of his death were, and had been since 1902, in the custody of the Mercantile Safe Deposit Company in New York, and a cash balance in a New York Bank.

The Court of Appeal for Ontario, over-ruling the decision of the trial judge, held that the above property was liable to succession duty under the Act.

On appeal to the Privy Council their lordships reversed this decision and say, at p. 513:—

"The pith of the matter seems to be that the powers of the legislature being strictly limited to 'direct taxation within the province' any attempt to levy a tax on property locally situate outside the province is beyond their competence. . . . Directly or indirectly the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province — taxation of property not within the province."

Note.—But No. 2 of section 92 of the B. N. A. Act 1867 (*supra* p. 32) does not require the persons to be

taxed to be domiciled or even resident in the province. Any persons found within the province may be legally taxed there if taxed directly: *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. at pp. 584-5.

ATTORNEY-GENERAL OF ONTARIO v. ATTORNEY-GENERAL OF THE DOMINION.

(*Liquor Prohibition Appeal,* 1895).

[1896] *A. C.* 348.

The reader of this little book who has seen the judgment of the Privy Council on the above appeal already ranked three times for different reasons among leading decisions, will be surprised to learn that it has yet a fourth claim to that distinction, namely, as settling finally the signification of No. 8 of section 92 of the British North America Act by which 'Municipal Institutions in the Province' are placed among the classes of subjects in relation to which provincial legislatures may exclusively make laws.

Their lordships say, at pp. 363-4, that it "simply gives provincial legislatures the right to create a legal body for the management of municipal affairs."

In other words their exclusive power in regard to municipal institutions enables provincial legislatures to create municipal institutions,—to make all such laws as are reasonably necessary to establish, carry on, and work such institutions,—and when created, to give those municipal bodies any powers which come fairly within the subjects with which provincial legislatures are entitled to deal.

Note.—A good deal of confusion and uncertainty at one time surrounded the interpretation of this provincial power owing to the view taken by many Canadian judges that its scope depended upon the municipal institutions which existed, or the powers which were exercised by municipal corporations in this, that, or the other province, before Confederation.

CANADIAN PACIFIC R. W. CO. v. OTTAWA FIRE INSURANCE CO.

(1907) 39 *S. C. R.* 405.

The Canadian Pacific Railway Company brought this action against the Ottawa Fire Insurance Company, upon a policy of fire insurance issued by the latter insuring the Railway company against all claims for loss or damage caused by locomotives, to property located in the State of Maine, through which a portion of the railway passes. The policy appeared from the signatures to it, to have been issued partly at Ottawa, and partly at Montreal. The loss which the Railway company sought to recover represented the value of certain timber burnt upon lands adjoining the railway in Maine. The Insurance Company was incorporated under the Ontario Insurance Act.

It was contended that as the power of provincial legislatures to incorporate companies is by No. 11 of section 92 of the British North America Act confined to 'the incorporation of companies with provincial objects,' the defendant's Act of incorporation could not authorise them to issue the policy on which the action was brought.

The majority of the Court, however, held that a company incorporated by a provincial legislature to carry on the business of fire insurance is not, as such, incapable of entering outside the boundaries of its province of origin into a valid contract of insurance of property, situate outside the province.

The question turned upon the meaning and effect of 'with provincial objects' in the above clause, No. 11 of section 92, and whether it means merely that provincial legislatures cannot incorporate companies

whose objects or purposes are such as under section 91 of the British North America Act, the Dominion parliament can alone incorporate companies to carry out; or whether it also means 'provincial' in a territorial sense, *i.e.,* that the business of the company must be strictly confined to the area of the province. The majority of the judges held that it does not mean that the business carried on by provincial companies must be strictly confined to the area of the province which incorporates them.

Note.—The same question, with others relating to the respective powers of the Dominion parliament and the provincial legislatures in respect to companies, and the incorporation thereof, came up before the Supreme Court at Ottawa on questions referred to it by the Governor-General in Council, and was answered by the majority of the Court in the same way: *In re Incorporation of Companies* (1913), 48 S. C. R. 331; an appeal from which decision is now pending before the Judicial Committee of the Privy Council. But the responses to such references of hypothetical cases are not binding either on the judges who have given them, or on any other judges, if at any time they are called upon to adjudicate on similar points in concrete cases coming before them in their strictly judicial capacity: *In re References by the Governor-General in Council* (1910) 43 S. C. R. at pp. 550, 561, 588, 592; *Kerley* v. *London and Lake Erie Transportation Co.* (1912) 26 O. L. R. 588.

IN RE MARRIAGE LEGISLATION IN CANADA.

[1912] *A. C.* 880.

In 1912 the Governor-General in Council submitted to the Supreme Court of Canada, the question whether the Dominion parliament had authority to enact a certain Bill providing as follows:—

'(1) The Marriage Act, chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

'Every ceremony or form of marriage heretofore or hereafter performed by any person authorised to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada, be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married, and without regard to the religion of the person performing the ceremony.

'(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriages, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada, shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.''

The submission of this question was the indirect outcome of a contention which had arisen in the province of Quebec, that the law of that province renders null and void, unless contracted by a Roman Catholic priest, a marriage which takes place in that province

between persons, one of whom only is a Roman Catholic.

The Supreme Court replied that the proposed legislation was *ultra vires;* and this appeal was taken from their decision.

The contention on the part of the Dominion was that the provincial power extends only to the directory regulation of the formalities by which the contract of marriage is to be authenticated, and that it does not extend to any question of validity. Their lordships refused to accede to this view, and say:—

"Their lordships have arrived at the conclusion that the jurisdiction of the Dominion parliament does not, on the true construction of sections 91 and 92 of the British North America Act, cover the whole field of validity. They consider that the provision in section 92, conferring on the provincial legislature the exclusive power to make laws relating to 'the solemnization of marriage in the province,' operates by way of exception to the powers conferred as regards marriage by section 91,' (see *supra* p. 12), 'and enables the provincial legislature to enact conditions as to solemnization, which may affect the validity of the contract. There have, doubtless, been periods, as there have been, and are countries, where the validity of marriage depends on the bare contract of the parties without reference to any solemnity. But there are, at least, as many instances, when the contrary doctrine has prevailed. The common law of England, and the law of Quebec before Confederation, are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. *Primâ facie* these words appear to their lordships to import that the whole of what solemnization ordinarily meant in the system of law

of the provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity.''

Note.—The provincial power extends only to 'solemnization of marriage *in the province';* and although the above Privy Council decision establishes the fact that a provincial legislature may enact that no marriage celebrated, or purporting to be celebrated, in the province of which it is the legislature, shall be valid unless solemnized in the manner and under the conditions prescribed by it, as *e.g.,* by a Roman Catholic priest, yet this is not saying that a provincial legislature can validly enact that inhabitants of the province of which it is the legislature, shall not be validly married if they go, for that purpose, into another province, and are married according to the solemnities and under the conditions prescribed by the legislature of this latter province for marriages contracted within its borders.

THE ROYAL BANK OF CANADA v. THE KING.

(*The Alberta and Great Waterways Railway Case.*)

[1913] *A. C.* 283.

The Attorney-General of Alberta on behalf of the Crown and the Provincial Treasurer brought action in Alberta against the Royal Bank of Canada, for the recovery of $6,000,000 then on deposit with it. This money had been advanced by parties in London, England, upon the bonds of the Alberta and Great Waterways Railway Company. The money had originally been paid into the Royal Bank of Canada, at its branch in New York, and, under instructions of the Head Office of the Bank of Montreal, placed to the credit of the Provincial Treasurer of Alberta in a special account at Edmonton, all under an agreement or understanding with the Government of Alberta and the railway company, that the money should be paid out upon the construction of the railway as the work progressed. The Alberta Government guaranteed the bonds. Then when the construction of the railway had been barely commenced, the Alberta legislature, under circumstances not necessary to mention here, in 1910, pass an Act confiscating the money to the general revenue purposes of the province, while reaffirming the guarantee, and providing for the indemnification of the railway company as to all claims which might be brought against it. Stuart, J., before whom the action was tried, gave judgment in favour of the plaintiffs that they recover from the bank the full amount claimed with interest, holding the provincial Act *intra vires* as upon a matter of merely local concern. The Supreme Court of the province dismissed an appeal from this

judgment with costs, holding that, at any rate, the provincial Act fell within No. 13 of section 92 of the British North America Act under which exclusive legislative jurisdiction is given to the provincial legislatures over 'property and civil rights in the province.' The Royal Bank then appealed to the Privy Council, who allowed the appeal and dismissed the action.

Their lordships say (at pp. 296-8), of the provincial Act in question:—

"It purports to appropriate to the province the balance standing at the special account in the Bank, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. . . . It appears to their lorships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910, altered its conditions, the lenders in London were entitled to claim from the Bank at its head office in Montreal, the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the legislature of the province could not legislate validly in derogation of that right. In the opinion of their lordships, the effect of the statute of 1910, if validly enacted, would have been to preclude the Bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right, which had arisen and remained enforceable outside the province. The statute was on this ground beyond the powers of the legislature of Alberta inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province, nor directed solely to matters of merely local or private nature within it."

Note.—We must look to future judgments of the Judicial Committee to make clear the full significance

of the above decision. The import of it seems to be that when the civil rights to be affected are civil rights in respect of a debt, in order that the provincial legislature may have jurisdiction to deal with that debt, it is necessary that both debtor and creditor, and all parties concerned should be within the local limits of the province; and that, if persons who are outside the province have rights in the debt in question, that will exclude the jurisdiction of the provincial legislature. Apart from this judgment it might have been supposed that a civil right in a province, or anywhere, is nothing else than a right to invoke the assistance of the Civil Courts of that province, or other place, to give effect to some claim, whether by way of action, or of defence to an action; and that so far as anyone has such a right, he has 'a civil right' in that province, or other place, whether he has or has not a similar right, under the same set of facts, elsewhere or not; and that over such a civil right in a Canadian province, the provincial legislature has plenary power, saving always the powers of the Dominion parliament (see *supra p.* 22).

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR THE DOMINION.

(*Liquor Prohibition Appeal,* 1895.)

[1896] *A. C.* 348.

Once again (see *supra,* pp. 18, 22, 59), we have to rank this famous judgment of the Privy Council as a leading case, in that it, for the first time, authoritatively explained the function of No. 16 of section 92 of the British North America Act, whereby the provincial legislatures are given the exclusive power of making laws in relation to—'Generally all matters of a merely local or private nature in the province.'

Their lordships say, at p. 365:—

"In section 92, No. 16 appears to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, as far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense local or private, which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to subjects already enumerated."

Note.—'Local' in No. 16 of section 92, does not mean local in a spot in the province, but local in the sense of confined within the boundaries of the province. If an Act is confined in the sphere of its operation to the limits of a province, it is local, although, of

course, whether it is *intra vires* or not must depend upon whether, notwithstanding this, the subject of the Act does or does not fall within one of the enumerated classes of subjects in section 91. 'Merely,' apparently, means—not touching by its immediate and direct operations those outside the province. See Legislative Power in Canada, pp. 655-661. The Liquor Act of Manitoba was *intra vires*, although it prohibited all use in the province of spirituous fermented malt and all intoxicating liquors as beverages or otherwise, subject to certain exceptions: *Attorney-General of Manitoba* v. *Manitoba License Holders Association,* [1902] A. C. 73.

MAHER v. TOWN OF PORTLAND.

(1874) *Wheeler's Confederation Law*, p. 366.

On June 16th, 1873, Henry Maher, a Roman Catholic resident of New Brunswick, moved the Supreme Court of New Brunswick for a rule to shew cause why a writ of *certiorari* should not be issued to remove into Court an order of assessment against him made by the Town of Portland, in that province, under the New Brunswick Common Schools Act, 1871, upon the ground that the said Act was void in face of the 93rd section of the British North America Act, inasmuch as the rights and privileges of the Roman Catholic inhabitants of the province had been prejudicially affected.

The exclusive power of legislating upon the subject of education is by the 93rd section of the British North America Act, conferred upon the legislature of each province, subject to certain provisions, amongst which is the following:—

'(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.'

The evidence given was that after the passing of the New Brunswick Parish Schools Act, 1858, up to the passing of the Act complained of in 1871, the special doctrines of the Roman Catholic Church were taught in some of the parish schools of the province, and an annual allowance out of the rates was made for the support of such schools under provisions for voluntary assessment in the district, parish, or county where the ratepayers determined to adopt that mode

of supporting the schools, in which case the schools were declared to be free to the children of all the inhabitants; but the Act of 1871 prohibited the grant of public aid to any but schools conducted under its provisions, and expressly provided that all schools conducted under its provisions should be nonsectarian, so that the enjoyment of aid from public school funds was thus withdrawn from such schools in which the Roman Catholic doctrine was distinctly taught, and thereby it was contended, a right or privilege enjoyed by the Roman Catholics of New Brunswick had been prejudicially affected.

The Supreme Court of New Brunswick refused the application, but gave leave to bring the present appeal to the Privy Council, which confirmed the judgment appealed from.

In giving judgment their lordships say:—"The question alone to which we desired counsel to confine themselves, as lying at the root of the whole thing, is whether the schools which existed in New Brunswick under the Parish Schools Act, — which existed there before the new Act, — were denominational schools or not. . . . The whole machinery of the Act is designed to make the schools common to the children of every man, irrespective of his religious opinions. . . . No class or creed had under the Act any peculiar right, either in the general government of the whole province or in any parish or school. . . . It has been contended on the part of the appellant that *de facto* they became denominational schools in this way—that is to say, that whereas the whole machinery was left local, the ratepayers had the power of appointing the master, and of appointing the trustees of the schools, but whether the whole inhabitants of a district, or the great majority of a district, belonged to

the Roman Catholic faith, or belonged to a protestant sect, there they could so work the school practically as to give it a denominational character, or a denominational hue; that is to say, if all the children were Roman Catholic, Roman Catholic teaching would be found in that school; but the fact that that might be the accidental result of the mode of working the Act under the old system is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow by a change of the inhabitants of the district, or a change in their views; and that is not a thing to which it is possible to give the colour of a legal right. Their lordships are, therefore, of opinion that there is nothing in the ground taken by the appellant, or anything unconstitutional in the Act of New Brunswick'' (*sc.* the Common Schools Act, 1871).

This judgment then takes rank as a leading case because it settles what is and what is not a 'denominational school' within the meaning of section 93 of the British North America Act.

Note.—The decisions under section 93 of the B. N. A. Act, 1867, and the corresponding section 22 of the Act of 1870 establishing and providing for the government of Manitoba, are discussed at length in Canada's Federal System, pp. 630-666.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEYS-GENERAL FOR THE PROVINCES.

(*The Fisheries Case*).

[1898] *A. C.* 700.

By virtue of section 108 of the British North America Act, and the Third Schedule to that Act, it is enacted that 'Public Harbours' shall be the property of the Dominion: and on appeal from the judgment of the Supreme Court on the questions submitted to them by the Governor-General in this case (see *supra* pp. 20, 38), the Judicial Committee had occasion to explain what is meant there by 'Public Harbours.'

At pp. 711-712 they say:—"With regard to public harbours their lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the third schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term 'harbour' on which public works had been executed became vested in the Dominion, and that no part of the sea did so. Their lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in *Holman* v. *Green* (1881) 6 S. C. R. 707, where it was held that the foreshore between high and low water mark on the margin of the harbour became the property of the Dominion as part of the harbour. Their lordships think it extremely inconvenient that a determination should be sought of the

abstract question, what falls within the description 'public harbour.' They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green, supra,* that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion. Their lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may, or may not, do so, according to circumstances. If, for example, it had actually been used for harbour purposes, it would no doubt form part of the harbour; but there are other cases in which, in their lordships' opinion, it would be equally clear that it did not form part of it.''

Note.—A curious question suggests itself, whether any inlet or harbour vests in the Crown in right of the Dominion (see *supra* pp. 6-7) as soon as it becomes a public harbour through public improvements, or otherwise, although it was not a public harbour at the time of the Union. What authority there is points to the conclusion that it does: *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.* (1905) 11 B. C. at p. 296; Nash v. Newton (1891) 30 N. B. at p. 618.

ST. CATHARINE'S MILLING AND LUMBER CO. v. THE QUEEN.

(*Indian Lands Case*).

(1888) 14 *App. Cas.* 46.

On October 3rd, 1873, a formal treaty or contract was concluded between commissioners appointed by the Government of the Dominion of Canada, on behalf of the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteau tribe of Ojibeway Indians, of the other part, by which the latter for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent. Of the territory thus ceded to the Crown, not less than 32,000 square miles were situated within the boundaries of Ontario. The St. Catharine's Milling and Lumber Company cut timber on this part of the land without authority from the Ontario Government, which accordingly brought action for an injunction and damages. The company justified their action by setting up a license from the Dominion Government dated May 1st, 1883. The question thus arose whether the land belonged to Ontario or to the Dominion. The Supreme Court of Canada, affirming the judgment of the Court below, decided in favour of the province, and by Order of Her Majesty in Council, special leave was granted to bring the present appeal.

Their lordships affirmed the judgment appealed from, and say:—

"The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on October 7th, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the 'possession of such part of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds,' it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or 'until Our further pleasure be known,' upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared 'to be Our Royal will, for the present, as aforesaid, to reserve under Our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson's Bay company.' The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must

be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie. The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. . . . Whilst there have been changes in the administrative authority, there has been no change since the year 1873 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. . . . The terms of the instrument shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the Sovereign. . . . There has been all along vested in the Crown a substantial and paramount estate, under-lying the Indian title, which became a *plenum dominion* whenever that title was surrendered or otherwise extinguished. By an Imperial statute passed in the year 1840 (3-4 Vict. c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, *inter alia,* enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the consolidated fund of the new province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales, or in any other manner, became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue,

passed to the province the title still remaining in the Crown. That continued to be the right of the province until the passing of the British North America Act, 1867. . . . Section 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada," (see *supra* pp. 6-7). . . . The enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. . . . Section 109 provides that 'all lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate, or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same':" (see *infra* p. 94). . . . Had the Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873: *Attorney-General of Ontario* v. *Mercer*" (see *infra* p. 90) "might have been an authority for holding that the province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union land vested in the Crown, subject to 'an interest other than that of the provinces in the same' within the meaning of section 109; and must now belong to Ontario in terms of that clause. . . ."

This then, is the leading case on the nature of the Indian title, and the right of the provinces in respect to what are generally spoken of as Indian lands. The

Privy Council follow their decision in this case in their later judgment of *Ontario Mining Co.* v. *Seybold* [1903] A. C. 73. The Government of British Columbia has, since that province entered Confederation in 1871, taken up the position that the leading case does not apply to Indian lands in their province. Attempts are now being made to bring the matter up before the Privy Council: Canada's Federal System, pp. 711-4.

THE ATTORNEY-GENERAL OF ONTARIO v. MERCER.

(*Escheats*).

(1883) 8 *App. Cas.* 767.

On September 28th, 1878, the Attorney-General of Ontario filed an information on behalf of the Crown to recover from the defendant and others possession of a certain piece of land in the City of Toronto, being part of the real estate of Andrew F. Mercer, who died intestate on June 13th, 1871, and without leaving any heirs or next of kin. The first Court held in favour of the informant that the land had escheated to the Crown for the benefit of the province. The Dominion Government appealed in the name of the defendant, and it was agreed between the two Governments that the appeal should be limited to the question whether the Government of Canada or that of Ontario was entitled to lands situate in the province of Ontario and escheated to the Crown for want of heirs.

The Supreme Court, by a majority, reversed the judgment and dismissed the information, on the grounds, stated shortly, that escheat is not a reversionary right but a fiscal prerogative; that the privileges of the provinces were surrendered as a preliminary to the Confederation affected by the British North America Act, 1867; that by that Act all duties and revenues were transferred to the Dominion and to be appropriated to the public service of Canada; and that the Federation Act does not confer on the Government or legislature of Ontario any right to receive or dispose of the revenue arising from escheated estates situate in the province.

The Judicial Committee reversed the Supreme Court, deciding that whether the word ' royalties ' in section 109 of the British North America Act (see *supra* p. 88) extended to royal rights besides those connected with lands, mines, and minerals, or not, a point which they were not called upon to decide, it certainly included royalties in respect to lands, such as escheats, and ought not to be restrained to rights connected with mines and minerals only. They held, therefore, that lands in Ontario escheated to the Crown for defect of heirs belonged "in the sense in which the verb is used in the British North America Act" (see *supra* pp. 6-7) to the province and not to the Dominion; and that this was one of the exceptions referred to in section 102 of the Act,[1] whereby, subject to such exceptions, the general public revenues of the province were vested in the Dominion; for the profits and proceeds of sales of land escheated to the Crown are part of the casual territorial revenues of the Crown."

Note.—" 'Escheat' is a word of art, and signifieth properly when, by accident, the lands fall to the lord of whom they are holden, in which case we say the fee is escheated" (Co. Litt. 13a). The profits, and the proceeds of sales of lands escheated to the Crown, were in England part of the casual hereditary revenues of the Crown, and they were among the hereditary revenues placed at the disposal of Parliament by the Civil List Acts, passed at the beginning of Queen Victoria's reign, and of the reign of William IV.

[1] ' 102. All duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one consolidated revenue fund to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.'

Those Acts extended, expressly to all such casual revenues, arising in any of the colonies or foreign possessions of the Crown. But the right of the several Colonial legislatures in British North America to appropriate and deal with them, within their respective territorial limits, was recognized by the Imperial statute, 15-16 Vict. c. 39, and by an earlier Imperial statute (10-11 Vict. c. 71) confirming the Canada Civil List Act, passed in 1846 after the Union of Upper and Lower Canada. When, therefore, the British North America Act, 1867, passed, the revenue arising from all escheats to the Crown, within the then province of Canada, was subject to the disposal and appropriation of the Canadian legislature. It may be added that in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889) 14 App. Cas. 295, known as the Precious Metals case, the Privy Council decided, in conformity with their judgment in *Attorney-General of Canada* v. *Mercer, supra,* that the word 'royalties' in section 109 (*supra* p. 90) includes prerogative rights to gold and silver mines.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

(*Indian Claims case*).

[1897] *A. C.* 199.

In the year 1850 the Ojibeway Indians inhabiting the Lake Huron district, and the Indians of the same tribe inhabiting the Lake Superior district, entered into separate treaties with the Governor of the then province of Canada, acting on behalf of Her Majesty and the Government of the province, for the cession of certain tracts of land, which had until that time been occupied as Indian reserves; and the lands were accordingly surrendered in consideration of certain sums paid down and certain perpetual annuities, and on the further term and agreement that in case the territory ceded should at any future period produce an amount which would enable the Government of the province, without incurring loss, to increase the annuities, then the same should be increased from time to time on the scale therein provided.

In 1891 certain statutes were passed concurrently in the Dominion parliament and the Ontario and Quebec legislatures providing for the settlement, by arbitration, of accounts between the Dominion and those two provinces; and in the course of that arbitration the question arose whether the right to have the annuities increased under the above treaties constituted a 'trust' or 'interest' in respect to the lands in favour of the Indians within the meaning of section 109 of the British North America Act (*supra* p. 88).

The decision of the arbitrators upon this point was brought under the review of the Supreme Court by an appeal at the instance of Ontario, which, by a majority, reversed the award, and held that the ceded territory became the property of Ontario under section 109 absolutely, and free from any trust, charge, or lien in respect of any of the annuities, whether original or augmented. An appeal was now taken to the Privy Council, which, however, affirmed the Supreme Court.

They say, at pp. 221-3:—"The expressions 'subject to any trusts existing in respect thereof,' and 'subject to any interest other than that of the province' appear to their lordships to be intended to refer to different classes of right. Their lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a Court of Equity would undertake to administer; but, in their opinion, must, at least, have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate, or its proceeds, to make payment, out of one or other of those, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand 'an interest other than that of the province in the same' appears to them to denote some right or interest in a third party independent of, and capable of being vindicated in competition with, the beneficial interest of the old province. Their lordships have been unable to discover any reasonable grounds for holding that by the terms of the treaties any independent interest of that kind was conferred upon the Indian communities. . . . Their lordships have had no difficulty in coming to the conclusion that under the treaties the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement which was nothing more than a personal obligation by its Governor, as representing the old province,

that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation, or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.''

Note.—Such a ' trust ' or ' interest ' as is referred to in section 109 is exemplified by the right possessed by the Canada Central Railway Company, under its charter, comprised in Acts of the old province of Canada, to pass over any portion of the country between limits mentioned therein, and carry the railway through the Crown lands lying between the same: *Booth* v. *McIntyre* (1880) 31 C. P. 183; and the trust created, by statute of the old province of Canada, in certain public lands of the province, in favour of the Common Schools: *Provinces of Ontario and Quebec* v. *Dominion of Canada* (1898) 28 S. C. R. 609. See, also, *supra,* p. 88.

DOMINION OF CANADA v. PROVINCE OF ONTARIO.

(*Indian Treaty Indemnity Case*).

[1910] *A. C.* 637.

As we have already seen (*supra,* p. 85), on October 3rd, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments and other rights, at the same time extinguishing, by consent, their interest over a large tract of land, the greater part of which was subsequently ascertained to lie within the boundaries of the province of Ontario. It having been decided (see *supra,* pp. 85-9) that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court of Canada for a declaration that it was entitled to recover from, and be paid by, the province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty.

The Exchequer Court took its jurisdiction to deal with the matter under a Dominion Act, and a confirmatory Ontario Act, which Act provided that the Exchequer Court should have jurisdiction in cases of controversies between the Dominion of Canada and each province.

The Privy Council now held, affirming the judgment of the Supreme Court that, having regard to the jurisdiction conferred upon the Exchequer Court, the

action must be dismissed as unsustainable on any principle of law.

Their lordships say, at p. 645:—

"The Court of Exchequer, to which by statutes both of the Dominion and the province a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a Dominion comprising various provinces of which the laws are not in all respects identical, on the one hand, and a particular province with laws of its own, on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States and provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their lordships that the claim of the Dominion can be sustained on any principle of the law that can be invoked as applicable."

This judgment takes rank among leading cases on Canadian Constitutional law because it affirms, in the case of Canada, that 'rule of law' which is one of the most precious elements of British liberty. See Dicey's Law of the Constitution, 7th ed., pp. 179-201.

BARRETT v. CITY OF WINNIPEG.

(1892) *A. C.* 445.

In 1890 the Legislature of Manitoba passed an Act doing away with the then existing system of denominational schools. It was contended by the Roman Catholic minority that this Act was a violation of sec. 22 of the Act (Dominion) creating the Province of Manitoba, which, in giving the legislature exclusive power to make laws in relation to education, provides that "(1) nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province of the Union." The evidence established that prior to Manitoba's entry into Confederation there were denominational schools regulated and controlled by the Roman Catholic and various Protestant denominations, but that there were no public schools in the sense of State schools.

In pursuance of the Act of 1890, the City of Winnipeg passed by-laws imposing taxes on all ratepayers for the support of the public schools. Barrett, a Roman Catholic ratepayer, moved to quash the by-laws for illegality. The Manitoba Courts sustained the by-laws, the Supreme Court of Canada reversed the decision and the City appealed.

The Privy Council held that the minority still possessed all such rights as they had possessed prior to the union—to establish denominational schools and maintain them by school fees or voluntary subscriptions, and to conduct them according to their own religious

tenets. "No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend." It is owing to religious conviction and not to the law that they find themselves unable to partake of advantages which the law offers to all alike. The legislature has declared in so many words that "the public schools shall be entirely unsectarian," and that principle is carried out throughout the Act.

BROPHY v. MANITOBA.

(1895) *A. C.* 202.

Following the adverse decision of the Privy Council in the Barrett case, the Catholic minority in Manitoba took advantage of sub-sec. (2) of sec. 22 of the Manitoba Act, and appealed to the Governor-General in Council from the Act of 1890, as one "affecting any right or privilege" of the minority in relation to education, and asked for a remedial order under sub-sec. (3). Before dealing with the petitions, the Government submitted a number of questions to the Supreme Court of Canada as to the power of the Government to grant the prayer of the petitioners. In consequence of the decision of the Privy Council in the Barrett case the majority of the Court answered in the negative.

The Privy Council held that the remedy provided in sub-secs. (2) and (3) was not designed merely as a means of enforcing the provision in sub-sec. (1), which could be amply protected by the Courts in the ordinary manner, but extended to "any" right or privilege, including those acquired by legislation subsequent to the Union; such subsequent rights having been in fact affected the Governor-General in Council has jurisdiction and the Parliament of Canada may make remedial laws to the extent necessary to meet legitimate grounds of complaint.

TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF OTTAWA v. MACKELL AND OTHERS.

(1917) *A. C.* 62.

and

TRUSTEES, ETC. v. OTTAWA CORPORATION AND OTHERS.

(1917) *A. C.* 76.

In 1913 the Department of Education for Ontario, acting under provincial statutory powers, issued a regulation known as No. 17, restricting the use of the French language as a medium of instruction in both public and separate schools. The appellants, who were duly elected by the supporters of the Separate Schools in the City of Ottawa to be trustees of these schools, refused to conduct the schools in accordance with this regulation. Mackell *et al.* brought action to compel the trustees to conform to the regulations and a mandatory order was made and confirmed by the Ontario Court of Appeal. At the same time the legislature passed an Act authorizing the appointment of a Commission to take the place of and exercise all the powers of the school board should the trustees continue to refuse to comply with the regulations. The Commission was subsequently appointed and the trustees brought action for an injunction restraining the City Corporation from paying to the Commission the school rates which they had collected. The action was dismissed and the decision confirmed by the Court of Appeal. The trustees appealed to the Privy Council,

their contention in both cases being that the Acts of the legislature were contrary to the provisions of sub-sec. (1) of sec. 93 of the British North America Act.

Held—in the first case:

(1) That the class of persons for whom the protection of the sub-section is claimed must be a class determined by religious belief and not by race or language.

(2) That the power of the appellants as trustees to determine the "kind and description" of schools did not extend to determining whether English or French should be the language of instruction.

(3) That the regulation did not prejudicially affect any right or privilege secured by law at the Union to Roman Catholics in the Province, and that it was consequently valid and binding upon the appellants.

Held—in the second case:

That the Act authorizing the appointment of the Commission was *ultra vires,* since it prejudicially affected the right of the supporters of the Separate Schools in Ottawa to elect trustees for the management of the schools.

JOHN DEERE PLOW CO., LTD. v. WHARTON.

(1915) *A. C.* 330.

By virtue of the power conferred upon them by sec. 92 (11), "The Incorporation of Companies with Provincial Objects," the various provinces of Canada have passed Acts for the incorporation of companies in the province and for the licensing of extra-Provincial Companies, including those incorporated by the Dominion. Such Acts usually provide for the granting of a license upon complying with certain conditions, the payment of fees and the establishment of an office or agent in the Province; and also provide penalties for carrying on business in the Province without a license, and deny the right to sue in the Courts to an unlicensed company.

The John Deere Plow Co., Ltd. having been incorporated under the Companies' Act of Canada, and having its chief place of business in Winnipeg, applied in British Columbia for a Provincial license and was refused on the ground of there being already a company of that name in the Province. Notwithstanding the refusal, the company carried on business in the Province and entered suit against one Duck, who pleaded the inability of the company to sue. This action was taken to restrain the company from carrying on business without a license, and with it was consolidated the action taken by the company against Duck.

Held, that a "Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised

in contravention of the laws of the Province restricting the right of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation." The provisions of the British Columbia Act in question were therefore held *ultra vires.*

Note.—The exact extent to which a Province may subject a Dominion company to restrictions is at the present time a subject of much litigation. The Saskatchewan Companies' Act, revised after the decision in the above case, was upheld by all the judges of the Supreme Court, 59 S. C. R. 19. The Manitoba Act, which omits the provision most objected to in the British Columbia Act, was upheld by a majority of the Court, 59 S. C. R. 41. Both cases are now in appeal to the Privy Council. The Ontario Act was considered and upheld except as to one section, 41 O. L. R. 475.

BONANZA CREEK GOLD MINING CO. LTD. v. THE KING.

(1916) *A. C.* 566.

The appellants having been incorporated as a mining company by letters patent under the Ontario Companies' Act, engaged in mining operations in the Yukon on properties held under lease from the Government of Canada, having obtained a license to carry on their business in the Yukon from the Commissioner. Disputes having arisen in respect of alleged breaches of agreements contained in the leases, the company brought an action for damages against the Crown. In answer the Crown denied the capacity of the company to carry on business in the Yukon, or to hold or accept a lease. The Exchequer Court and the Supreme Court upheld the Crown's objection.

Held, the actual powers and rights which a provincial legislature can bestow upon a company either by legislation or through the Executive are confined by sec. 92 of the British North America Act to powers and rights exercisable within the Province; but a Province is not precluded either from keeping alive the previously existing power of the executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person or from legislating so as to create by or by virtue of a statute a corporation with this general capacity. Such a company has the capacity of a natural person to acquire powers and rights and could accept powers and rights conferred on it by outside authorities.

WATTS v. WATTS.

(1908) *A. C.* 573.

When the Province of British Columbia became a part of the Dominion of Canada, it had adopted the law of England, civil and criminal, as it stood on the 19th day of November, 1858. Prior to that date the Divorce Act, 1857, had come into force in England, defining the grounds of divorce and creating a Court for the trial of such cases. The B. N. A. Act gives jurisdiction over Divorce to the Dominion, but no statute on this subject had been passed. This action was for divorce between persons domiciled in and in respect of offences committed in British Columbia.

Held, the substantive law relating to divorce as it was in England on November 19th, 1858, is part of the law of British Columbia, notwithstanding the absence of the special Court created in England for the trial of such causes, and the Supreme Court of British Columbia, being a Supreme Court of record, has jurisdiction to entertain a petition for divorce.

Note.—The same question has recently arisen in the Provinces of Manitoba (*Walker* v. *Walker* (1918) 2 W. W. R. 1); Alberta (*Board* v. *Board* (1918) 2 W. W. R. 633), and Saskatchewan (*Fletcher* v. *Fletcher* (1918) 3 W. W. R. 283). In each case the question turns on the effect of a Dominion Statute passed in 1888, declaring the law of England as it stood on July 15th, 1870, to be and have been in force since that day (as to matters coming within the Dominion jurisdiction). In the first named Provinces, the right to grant

divorces was upheld, but *contra* in Saskatchewan. The Privy Council, applying the principle of *Watts* v. *Watts,* has now confirmed the decision of the Courts of Manitoba and Alberta (*Walker* v. *Walker* (1919) 2 W. W. R. 935), (1919) A. C. 947, and (*Board* v. *Board* (1919) 2 W. W. R. 940), (1919) A. C. 956.

THE KING v. LOVITT.

(1912) *A. C.* 212.

This case presents a state of facts the converse of that in the Woodruff case. The testator, resident and domiciled in Nova Scotia, left monies on deposit in branches of the Bank of British North America in New Brunswick, on which succession duty was claimed by the Province of New Brunswick. The estate contended that the situation of such property is to be determined not by its actual locality, but according to the principle expressed in the maxim "*Mobilia sequuntur personam.*"

Held, that the maxim "*Mobilia sequuntur personam,*" though recognized by the law of England and by the comity of nations, may be overridden by the express words of a Provincial statute, and consequently a Province may become entitled to claim duty on the personal property of a person domiciled out of the Province. "The tax is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the Province, and is intended to be a direct burden on that property."

COTTON v. THE KING.

(1914) *A. C.* 176.

In 1906 the Quebec Succession Duties Act was amended by defining the property subject to the tax in such a way as to include all movables wherever situate of persons having their domicile or residing in the Province. For the estate of H. H. Cotton it was contended that such a tax is *ultra vires.* This contention was sutained by the Courts of Quebec, but overruled by the Supreme Court of Canada.

Held by the Privy Council, that "the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons." It is an instance of pure taxation, and is not direct taxation within the definition of J. S. Mill, now accepted as an authoritative statement of the meaning of the term as used in the B. N. A. Act. The appeal of the estate against the duties levied on movables actually situate outside of the Province was therefore allowed.

Note.—The wording of the reasons for judgment in this case throws grave doubt on the validity of the whole system of succession duties in the Provinces of Canada. It has however been held in several cases that the judgment was based on the wording of the Quebec statute, and is not applicable to the differently expressed Acts of other Provinces. See *Re Doe* (1914) 6 W. W. R. 510 (B.C.); *Re Cust Estate,* 7 W. W. R. 1286 (Alta.); *Re Muir Estate* (1914) 24 M. R. 310, and 51 S. C. R. 428.

IN RE THE INITIATIVE AND REFERENDUM ACT.

(1919) *A. C.* 935.

In 1916 the Legislature of Manitoba passed an Act providing a method for the compulsory reference of laws to a vote of the people. It provided that a stated proportion of the electors might by petition require the reference to the electors of any law proposed in the Legislature, or the submission of a law proposed by the petitioners or the repeal of an existing law. If approved by the majority of the votes polled, such law shall take effect not more than thirty days after the vote without any further action by the Legislature or the Lieutenant-Governor, or any discretion in them, but saving the power of disallowance of the Dominion.

Before bringing the Act into force, the Government referred a stated case to the Courts on the constitutionality of the Act. The Court of Appeal of the Province held the Act unconstitutional on the ground that the British North America Act, sec. 92, vests the power of making or repealing laws for a Province in a Legislature composed in part of elected representatives, and it is not within the powers of such a Legislature to enact any measure or provide means by which laws affecting the Province may be made or repealed by direct vote of the people. Further, such an Act would interfere with "the office of Lieutenant-Governor," and thus be against the express language of sub-sec. (1) of sec. 92 of the B. N. A. Act.

On appeal the Privy Council held that the Act did seriously affect the position of the Lieutenant-Governor as an integral part of the Legislature, since it compels him to submit a proposed law to the electors and renders him powerless to prevent it from becoming an actual law if approved by a majority of the voters. This part of the Act is therefore *ultra vires,* and the offending provisions are so interwoven into the scheme of the Act that they are not severable.

On the larger question, the Committee would do no more than draw attention to the gravity of the constitutional questions which arise. "No doubt a Provincial Legislature could, while preserving its own capacity intact, seek the assistance of subordinate agencies; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

RE SMALL DEBTS RECOVERY ACT.

37 *D. L. R.* 170.

This case is an illustration of a question which has arisen in several Provinces—the right of a Province to create a Court or Commission with certain judicial functions and powers, and to appoint the Commissioner or other officer to act therein. Is the appointment of such a judicial officer solely within the jurisdiction of the Dominion under sec. 96 of the B. N. A. Act?

In this case the Appellate Division of the Supreme Court of the Province of Alberta held that an Act of the Legislature of that Province conferring upon Justices of the Peace (appointed by the Province) a jurisdiction to try actions for debt within certain limited areas and for limited amounts, did not encroach on the Dominion powers as to appointment of judges.

See *Kelly* v. *Mathews,* 25 Man. L. R. 580, as to the appointment of an investigating commission with power to compel the attendance of witnesses and to commit; *Colonial Investment* v. *Grady,* 8 Alta. L. R. 496, as to conferring upon a Master the extraordinary powers of a judge as to certain kinds of actions; *Polson Iron Works* v. *Munns* (Alta.) 24 D. L. R. 18, as to the appointment of a Master; *Winnipeg Electric Railway* v. *City of Winnipeg* (1917) 1 W. W. R. 9, as to the power of the Province to appoint the Public Utilities Commissioner; *Toronto Railway Co.* v. *City of Toronto* (1919) 44 O. L. R. 381, as to the power of the Province of Ontario to appoint the Railway and Municipal Board; *Kowhanko* v. *Tremblay,* (1919) 50 D. L. R. 578, as to the power of the Province of Manitoba to appoint the Workmen's Compensation Commissioner.

APPENDIX

Sections of the British North America Act, 1867, specially referred to in the leading cases noted in this volume.

33 Victoria, Chapter 3.

An Act for the Union of *Canada, Nova Scotia,* and *New Brunswick,* and the Government thereof; and for Purposes connected therewith.

[29th *March,* 1867.]

WHEREAS the provinces of *Canada, Nova Scotia,* and *New Brunswick* have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of *Great Britain* and *Ireland,* with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the *British* Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of *British North America:*

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and

Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I.—Preliminary.

1. This Act may be cited as The *British North America* Act, 1867.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of *Great Britain* and *Ireland.*

* * * * * * *

6. The Parts of the Province of *Canada* (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of *Upper Canada* and *Lower Canada* shall be deemed to be severed, and shall form Two Separate Provinces. The Part which formerly constituted the Province of *Upper Canada* shall constitute the Province of *Ontario;* and the Part which formerly constituted the Province of *Lower Canada* shall constitute the Province of Quebec.

* * * * * * *

9. The Executive Government and Authority of and over *Canada* is hereby declared to continue and be vested in the Queen.

10. The Provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the Time being of *Canada,* or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of *Canada* on behalf and in the Name of the Queen, by whatever Title he is designated.

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17. There shall be One Parliament for *Canada,* consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

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58. For each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by Instrument under the Great Seal of *Canada.*

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62. The Provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

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VI.—Distribution of Legislative Powers.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of *Canada,* in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of *Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of *Canada.*
9. Beacons, Buoys, Lighthouses, and *Sable Island.*
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any *British* or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Saving Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. *Indians,* and Lands reserved for the *Indians.*
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes.
    a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    b. Lines of Steam Ships between the Province and any *British* or Foreign Country:
    c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of *Canada* to be for the general Advantage of *Canada* or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all matters of a merely local or private Nature in the Province.

Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2.) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in *Upper Canada* on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in *Quebec:*

(3.) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4.) In case any such Provincial Law as from Time to Time seems to the Governor-General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of *Canada* may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General in Council under this Section.

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102. All Duties and Revenues over which the respective Legislatures of *Canada, Nova Scotia,* and *New Brunswick* before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of *Canada* in the Manner and subject to the Charges in this Act provided.

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108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of *Canada.*

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of *Canada, Nova*

Scotia, and *New Brunswick* at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of *Ontario, Quebec, Nova Scotia* and *New Brunswick* in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

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126. Such portions of the Duties and Revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the Special Powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

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The THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power Connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and Public Vessels.
5. Rivers and Lake Improvements.

6. Railway and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

GENERAL INDEX